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HANDBOOK ^{cf}
OF THE
LAW OF SALES

SECOND EDITION REVISED

re-harmon
BY FRANCIS B. TIFFANY
AUTHOR OF DEATH BY WRONGFUL ACT

ST. PAUL, MINN.
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1908

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TIFF. SALES (2D ED.)

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REPLACEMENT

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PREFACE TO SECOND EDITION.

IN THIS edition a good deal of new matter has been added, many changes in arrangement have been made, and chapters 1, 3, 4, 7, and 10 have been partly rewritten. Many cases reported since the first edition, especially on mooted points, have been cited in the notes.

It has been deemed advisable to print in an appendix the proposed Sales Act, recommended by the Commissioners on Uniform State Laws, which has already been enacted in several states, and which bids fair, like the Negotiable Instruments Law, to be adopted generally. The act, like the English Sale of Goods Act, on which it is based, is in the main declaratory of the law, and is valuable as furnishing statements of rules which, for the most part, are of universal application. To a great extent, the statement of rules and principles in the Black-letter text has been made to conform to the language of the Sales Act. References to the appropriate sections are made in the notes, care being taken to point out changes proposed, or effected in states which have adopted the act. For purposes of comparison, the English Sale of Goods Act also has been printed in the appendix, and frequent references to it are made in the notes.

F. B. T.

St. Paul, Oct. 1, 1907.

(v)

PREFACE TO FIRST EDITION.

THE object of this handbook is to present concisely the general principles of the law of the sale of personal property. The arrangement is in the main that of Benjamin. The statement of rules and principles in the black-letter text has to a considerable extent, though with many modifications, necessitated by the differences between the American and English law, or by other reasons, been taken from the English Sale of Goods Bill, as drafted by his Honor, Judge Chalmers, and published together with his invaluable notes under the title of "The Sale of Goods." This bill, which was purely a codifying measure, has since been substantially enacted as "An act for codifying the law relating to the sale of goods" (56 & 57 Vict. c. 71; February 20, 1894). The writer has made frequent use both of the notes of Judge Chalmers and of the text of Benjamin on Sales. The references to Benjamin are to the sections as found in the sixth [now seventh] American edition, of Messrs. Edmund H. and Samuel C. Bennett.

F. B. T.

St. Paul, June 1, 1895.

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SECOND EDITION

CHAPTER I.

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- 11½-13. Subject-Matter of Sale.
- 14-15. Mutual Assent and Form of Contract.
- 16-17. The Price.

IN GENERAL.

- 1. SALE OF GOODS.** A sale of goods is an agreement whereby one party, called the seller, transfers the property in goods to the other party, called the buyer, for a price in money, which the buyer pays or agrees to pay.¹

¹ Following, substantially, Sales Act, § 1 (2). Cf. Sale of Goods Act, § 1.

The following are some of the definitions of "sale": "A transmutation of property from one man to another in consideration of some price." 2 Bl. Comm. 446. "A contract for the transfer of property from one person to another for a valuable consideration." 2 Kent,

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2. **CONTRACT TO SELL.** A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a price, which the buyer pays or agrees to pay.¹
3. **GOODS.** Goods include all chattels personal other than things in action and money.
4. **PROPERTY.** Property means the general property in goods, and not merely a special property.

Sale.

At common law the transfer of personal property, at least of all personal property that is included under the term "goods,"² unlike the transfer of real property, is effected by the mere agreement, verbal or written, of the parties. If the present transfer of the property in specific goods for a price be agreed upon, the property in them passes from seller to buyer, without delivery, by their mere mutual assent.³ The agreement by which the transfer is thus effected is called a "sale," or a "bargain and sale." The bargain struck, the transfer results by operation of law. The term "sale" is often applied, indeed, to the transfer itself, and a sale is sometimes defined as the transfer of the property for a price in money.⁴ The proposed Sales Act defines a sale of goods as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price," and this use of the term seems preferable.⁵

Contract to Sell—Distinguished from Sale.

A contract whereby the seller agrees to transfer the property in goods to the buyer, for a price, at a future time or on

Comm. (12th Ed.) 408. "A transfer of the absolute or general property in a thing for a price in money." Benj. Sales (7th Am. Ed.) § 1. "Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." Indian Contract Act 1872, § 77. "A sale of personal property is the transfer, in pursuance of a valid agreement, from one party, called the seller, to another, called the buyer, of the general or absolute title to a specific chattel, for a price, or a consideration estimated, in money." Mechem, Sales, § 1. See Blackb. Sales, Introduction; Williamson v. Berry, 8 How. (U. S.) 544, 12 L. Ed. 1170.

¹ See Sales Act, § 1 (1).

² Post, p. 4.

³ Post, p. 121.

⁴ See note 1, supra.

⁵ Sales Act, § 1 (2).

the performance of a condition, is a contract to sell. The term "contract of sale" is often used to include both sales and contracts to sell;⁷ and a sale is sometimes described as an "executed contract of sale," or an "executed sale," and a contract to sell as an "executory contract of sale," or an "executory sale."

The distinction between sales and contracts to sell is fundamental. There cannot be a sale unless the goods are "specific"—that is, unless the goods are identified and agreed upon at the time the sale is made;⁸ whereas, there can be a contract to sell, although the goods are not ascertained, and are not yet in existence or acquired by the seller.⁹ Again, a contract to sell is a contract pure and simple, while a sale is in the nature of a conveyance. "By an agreement to sell," says Judge Chalmers,¹⁰ "a *ius in personam* is created; by a sale a *ius in rem* is transferred. Where goods have been sold, and the buyer makes default, the seller may sue for the contract price, but where an agreement to buy is broken, the seller's remedy is an action for unliquidated damages.¹¹ If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. They may be taken in execution for his debts, and, if he becomes bankrupt, they pass to his trustee. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of the goods themselves, such as the actions for conversion and detinue.¹² In many cases, too, he can follow the goods into the hands of third parties. Again, if there be an agreement for sale, and the goods are destroyed, the loss, as a rule, falls on the seller; while, if there has been a sale, the loss, as a rule, falls on the buyer, though the goods have never come into his possession."¹³

⁷ Sale of Goods Act, § 1.

⁸ Post, p. 147. "Specific goods," see Sales Act, § 76 (1).

⁹ Post, p. 45 et seq.

¹⁰ Chalmers, Sale of Goods Act (6th Ed.) p. 7.

¹¹ Post, p. 344.

¹² Post, p. 364.

¹³ Post, p. 141.

Goods.

Broadly speaking, anything of value may be the subject of sale. "It is not necessary," said Story, "that the subject of sale should have a physical and corporeal existence and be susceptible of manual delivery; for, provided it have actual value, however intangible it may be, it may nevertheless be sold."¹⁴ Thus a copyright,¹⁵ or the right to copyright a work,¹⁶ or an invention before issue of letters patent,¹⁷ may be sold. And in a broad sense even a chose in action may be sold. Nevertheless the subject-matter of sale, using the word in a narrower sense, is "goods," a term which does not include all kinds of personal property.

The law of Sales relates peculiarly to the transfer of the property in goods, a term which applies to all tangible movable property except money,¹⁸ and does not include choses in action. It is true that in this country it is generally held that negotiable instruments, as well as shares of stock and other choses in action, "which are the subject of common sale and barter and which have a visible and palpable form," are comprehended within the term "goods, wares, and merchandises," as used in the statute of frauds, and that by some courts it is even held that other choses in action are comprehended in these words;¹⁹ but the assignment of things in action is governed by different rules than those that govern the transfer of the property in chattels personal which are susceptible of delivery. Negotiable instruments, indeed, stand upon a somewhat different footing from other choses in action, for they are susceptible of delivery; but the legal title to such instruments is transferred, not by sale in its narrower sense, but by negotiation.²⁰ Things attached to the land, again, as a rule, form part of the realty, and are not included in the term "goods," though, when severed from the land, they become goods. Thus a contract to sell

¹⁴ Story Sales (4th Ed.) § 187.

¹⁵ *Black v. Henry G. Allen Co.* (C. C.) 42 Fed. 618, 9 L. R. A. 433.

¹⁶ *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

¹⁷ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Dalzell v. Watch-Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

¹⁸ See *Chalmers, Sale of Goods Act* (6th Ed.) p. 124. As to money, see post, p. 72.

¹⁹ Post, p. 73.

²⁰ *Norton, Bills & Notes* (3d Ed.) 200.

standing trees, or the materials in a building upon the land, if the contract contemplates a present sale before severance, is generally held to be a contract for the sale of an interest in land; although, if it contemplates a severance before sale, it is a contract to sell the goods.²¹ Certain products of the soil, indeed, termed "fructus industriales," or "emblemments," which are the product of annual labor, such as wheat and potatoes, are chattels, and are, perhaps, to be included in goods.²² The cases involving the determination of the character of things attached to the soil have usually arisen under the statute of frauds, where it becomes material to determine whether a contract is for the sale of "goods, wares, and merchandises," or an interest in land, and different views have been taken by different courts. These questions will be discussed later.²³

The proposed American Sales Act, following the English Sale of Goods Act, declares that "goods include all chattels personal other than things in action and money. The term includes emblemments, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."²⁴ This definition would settle some vexed questions, and make some changes in the law in some jurisdictions.²⁵

Property.

The essence of a sale is the transfer of the property in goods from seller to buyer for a price.²⁶ The transfer must be of the general property or ownership, as distinguished from a special property;²⁷ for the general property may be in one person, and a special property in another. Thus, in the case of a pledge, the pledgee has only a special property, and the general property remains in the pledgor, who can transfer the general property to a third person, subject to the special property in the

²¹ Post, p. 74 et seq.

²² Post, p. 72 et seq.

²³ Post, p. 77.

²⁴ Section 76 (1).

²⁵ Post, p. 76, note 55.

²⁶ Chalmers, Sale of Goods Act (6th Ed.) p. 125.

²⁷ Sales Act, § 76 (1). As to the distinction between "the" property (that is, the general property) and "a" property (that is, a special property), see *Burdick v. Sewell*, 13 Q. B. Div. 159, at page 175, and 10 App. Cas. 74, at page 93.

pledgee.²⁸ Again, the property must be distinguished from the right to possession, for the right of property may be in one person and the right to possession in another, as where upon a sale the property in the goods passes to the buyer, but the seller retains a lien for the price, entitling him to retain possession of the goods until the price is paid.²⁹

SALE DISTINGUISHED FROM OTHER TRANSACTIONS.

5. The elements which distinguish a sale from other transfers are (1) that the transfer is of the general property, and (2) that it is for a price. If, in a transfer, either element is lacking, the transaction is not a sale.

Where General Property is Not Transferred—Bailment.

A bailment is "a delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when the special purpose is accomplished."³⁰ In a bailment, at most, only a special property passes to the bailee, who receives possession for a special purpose, and is bound to return the goods,³¹ or else, as in the case of a consignment of goods to a factor or commission merchant for sale, to dispose of the goods according to the instructions of the consignor and upon sale to account for the proceeds.³² In most cases the test of bailment is whether or not it is the intention of the parties that the thing received shall be returned. If the identical thing is to be returned, although in altered form, as in the case of logs to be made into boards, leather into shoes, or wheat into flour, the property is not transferred, and the transaction is a bailment;³³ but if the

²⁸ Post, p. 9.

²⁹ Post, p. 122 et seq.

³⁰ Schouler, *Bailm.* (2d Ed.) § 2. See Hale, *Bailm.* 1-9.

³¹ See cases cited notes 33, 34, *infra*.

³² Cf. *Ruthrauff v. Hagenbuc*, 58 Pa. 103.

³³ *Arnott v. Railway Co.*, 19 Kan. 95 (material added by manufacturer); *Irons v. Kentner*, 51 Iowa, 88, 50 N. W. 73, 33 Am. Rep. 119; *Gleason v. Beers*, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757; *Union Stockyards & Transit Co. v. Cattle Co.*, 59 Fed. 49, 7 C. O. A. 600; *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848.

Where A. delivered leather to B. to be made into boots, which B. was to consign to A., who was to sell them on a commission of 5 per

identical thing is not to be returned, and the receiver may deliver some other thing instead, the property is transferred, and the transaction is in effect a sale,⁸⁴ or, more accurately, an exchange.⁸⁵

Same—Grain in Elevator.

A difficult case arises where grain is deposited in an elevator or warehouse upon an understanding, express or implied, that the warehouseman may mix it with other grain of his own or of third persons, and draw from the mass to meet the orders of the depositors.⁸⁶ Some cases have taken the view that, because the identical grain was not to be returned, the property in it is transferred, and that the transaction is in effect a sale.⁸⁷ According to the prevailing view, however, the transaction is a bailment; the different depositors owning the entire mass as tenants in common, and the interest of each in the mass, as it is increased or diminished by additions or withdrawals by the warehouseman and other depositors, being measured by the proportionate amount of his deposit.⁸⁸ The deposit may, of course, be on such terms as to effect a transfer of the property,

cent., it was a bailment of the leather. *Schenck v. Saunders*, 13 Gray (Mass.) 37. And see *Hyde v. Cookson*, 21 Barb. (N. Y.) 92. But see *Jenkins v. Eichelberger*, 4 Watts (Pa.) 121, 28 Am. Dec. 691; *Prichett v. Cook*, 62 Pa. 193; *Butterfield v. Lathrop*, 71 Pa. 223.

⁸⁴ *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517; *Scott Mining & Smelting Co. v. Shultz*, 67 Kan. 605, 73 Pac. 908; *Potter v. Mill Co.*, 101 Mo. App. 581, 73 S. W. 1005. Cf. *Turnbow v. Beckstead*, 25 Utah, 468, 71 Pac. 1062.

⁸⁵ Post, p. 12.

⁸⁶ See 6 Am. Law Rev. 450.

⁸⁷ *Lawler v. Nichol*, 12 Manitoba R. 224. See, also, *South Australia Ins. Co. v. Randall*, L. R. 3 P. O. App. 101; *Rahilly v. Wilson*, Fed. Cas. No. 11,532, 3 Dill. (U. S.) 420; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623 (cf. *James v. Plank*, 48 Ohio St. 255, 28 N. E. 1107).

The latter cases are perhaps distinguishable on the ground that the warehouseman had the right to sell and to pay in money or grain. Post, p. 8.

⁸⁸ *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430; *Drudge v. Leiter*, 18 Ind. App. 694, 49 N. E. 84, 63 Am. St. Rep. 359; *Ardinger v. Wright*, 38 Ill. App. 98; *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Erwin v. Clark*, 13 Mich. 10; *Young v. Miles*, 20 Wis. 615, 23 Wis. 643; *Bretz v. Diehl*, 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706;

as where the agreement is simply that the warehouseman shall pay for the grain at the market price, on demand,³⁹ or where he receives the option to dispose of the grain at his pleasure and to pay in money, instead of returning grain from the mass.⁴⁰ On the other hand, the transaction may be a bailment, notwithstanding that the warehouseman has an option to buy when the receipt is presented, instead of returning grain, so long as it is contemplated that the option can be exercised only when the receipt is presented, and not that he may treat the grain as his own without first paying for it.⁴¹

Same—Bailment with Option to Buy.

A sale and a contract to sell are to be distinguished from a bailment with an option on the part of the bailee to buy the goods; for, if the agreement be that the receiver of the goods is to keep or have the use of them for a certain time, and that he may become owner upon full payment of the rent or of an agreed sum, the transaction is not a sale, because it is not the intention that the property shall pass until the payment is made,⁴² nor is it a contract to sell because the receiver is not

Nelson v. Brown, 53 Iowa, 555, 5 N. W. 719; *Odell v. Leyda*, 46 Ohio St. 244, 20 N. E. 472; *McBee v. Ceasar*, 15 Or. 62, 18 Pac. 652.

In some states it is declared by statute that the transaction is a bailment. *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673, 7 L. R. A. 529, 19 Am. St. Rep. 209; *State v. Cowdery*, 79 Minn. 94, 81 N. W. 750, 48 L. R. A. 92. And see *Snydacker v. Stubblefield*, 177 Ill. 506, 52 N. E. 742. See proposed Warehouse Receipts Act, § 23; post, note 172.

³⁹ *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Woodward v. Boone*, 126 Ind. 122, 25 N. E. 812; *Hagey v. Schroeder*, 30 Ind. App. 151, 65 N. E. 598; *Jones v. Kemp*, 49 Mich. 9, 12 N. W. 890; *Loneragan v. Stewart*, 55 Ill. 45; *Richardson v. Olmstead*, 74 Ill. 213; *Welland v. Sunwall*, 63 Minn. 320, 65 N. W. 628; *Reherd's Adm'r v. Clem*, 86 Va. 374, 10 S. E. 504; *State v. Stockman*, 30 Or. 36, 46 Pac. 851.

⁴⁰ *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Cloke v. Shafroth*, 137 Ill. 393, 27 N. E. 702; *Barnes v. McCrea*, 75 Iowa, 287, 39 N. W. 392, 9 Am. St. Rep. 473.

⁴¹ *Nelson v. Brown*, 44 Iowa, 455; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; *State v. Rieger*, 59 Minn. 151, 60 N. W. 1087.

⁴² *Rowe v. Sharp*, 51 Pa. 26; *Enlow v. Klein*, 79 Pa. 488; *Brown v. Billington*, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; *Goss Printing-Press Co. v. Jordan*, 171 Pa. 474, 32 Atl. 1031; *Sargent v. Gille*, 8 N. H. 325; *Hart v. Carpenter*, 24 Conn. 427; *Frye v. Burdick*, 67 Me.

bound to buy.⁴³ Such transactions are to be distinguished from so-called "conditional sales," where there is a contract to sell, accompanied by delivery of the goods to the buyer, with a reservation of the property in the goods in the seller to secure the payment of the price, which the buyer is bound to pay.⁴⁴

Same—Pledge.

A pledge is a bailment to secure the payment of a debt or the performance of an engagement,⁴⁵ and the general property remains in the pledgor, who can transfer the general property to a third person,⁴⁶ subject to the special property of the pledgee.⁴⁷ If the goods are delivered by way of security, the transaction is a pledge, and not a sale.⁴⁸ A debtor may, indeed, transfer the property in goods to his creditors in payment of a debt;⁴⁹ but although the transaction is in the form of a sale, and is evidenced by a written instrument or transfer, the debtor may show that the transaction was intended by the parties as a pledge.⁵⁰

Same—Chattel Mortgage.

A chattel mortgage differs from a pledge in that by it the general property in the mortgaged goods is transferred to the

408; *Braun v. Rendering Co.*, 92 Wis. 245, 66 N. W. 196; *Wiggins v. Tumlin*, 96 Ga. 753, 23 S. E. 75. And see *Orosby v. Canal Co.*, 119 N. Y. 334, 23 N. E. 736; ante, p. 2; post, p. 130.

⁴³ *Helby v. Matthews* (1895) App. Cas. 471. Cf. *Lee v. Butler* (1893) 2 Q. B. 318.

There may be a bailment with the obligation to buy if a condition happens; for example, in case the thing be damaged. *Blanchi v. Nash*, 1 Mees. & W. 545.

⁴⁴ Post, p. 134.

⁴⁵ *Hale*, Ballm. 102.

⁴⁶ *Halliday v. Holgate*, L. R. 3 Exch. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Harper v. Godsell*, L. R. 5 Q. B. 424; *Cortelyou v. Lansing*, 2 Caines, Cas. (N. Y.) 200.

⁴⁷ *Franklin v. Neate*, 13 Mees. & W. 481; *Jenkyns v. Brown*, 14 Q. B. 496; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399.

⁴⁸ *Kimball v. Hildreth*, 8 Allen (Mass.) 167; *Houser v. Kemp*, 3 Pa. 208; *Beldler v. Crane* (Ill.) 19 N. E. 714; *Irwin v. McDowell* (Cal.) 34 Pac. 708.

⁴⁹ *Reeves v. Sebern*, 16 Iowa, 234, 85 Am. Dec. 513; *Travers v. Leopold*, 124 Ill. 431, 16 N. E. 902.

⁵⁰ *Walker v. Staples*, 5 Allen (Mass.) 34; *Newton v. Fay*, 10 Allen

mortgagee.⁵¹ It differs from a sale in that the transfer is defeasible upon performance by the mortgagor of the conditions of the mortgage.⁵²

Same—Agency to Sell.

A sale is, of course, to be distinguished from a consignment or delivery of goods by the owner to a factor or other agent for sale. In such case the agent receives the goods as the goods of his principal, who retains the property in them, and in dealing with them must act according to his instructions, and is bound, not to pay a price, but simply to account for the proceeds of such sale as he may make on his principal's behalf.⁵³ Whether a contract is a contract of sale or a contract of agency is a question of substance, and not of form, and depends, not upon the name by which the parties choose to call it, but upon its real meaning, and often contracts which are clothed in the

(Mass.) 505; *Riley v. Bank*, 164 Mass. 482, 41 N. E. 679; *Jones v. Rahlily*, 16 Minn. 320 (Gil. 283); *Morgan v. Dod*, 3 Colo. 551.

⁵¹ *Jones, Chat. Mortg. § 4.* A mere lien under which the property does not pass, is to be distinguished from a chattel mortgage. *Scofield v. Elevator Co.*, 64 Minn. 527, 67 N. W. 645.

⁵² *Jones, Chat. Mortg. § 8; Ex parte Hubbard*, 17 Q. B. Div., at page 698; *In re Morritt*, 18 Q. B. Div., at page 232; *Jones v. Baldwin*, 12 Pick. (Mass.) 316; *Farshall v. Eggart*, 52 Barb. (N. Y.) 367.

⁵³ *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Metropolitan Nat. Bank v. Benedict Co.*, 74 Fed. 182, 20 C. C. A. 377; *In re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611; *Walker v. Butterick*, 105 Mass. 237; *St. Paul Harvester Co. v. Nicollin*, 36 Minn. 232, 30 N. W. 763; *Keystone Watch Case Co. v. Bank*, 194 Pa. 535, 45 Atl. 328; *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567; *Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192; *Norton v. Mellick*, 97 Iowa, 564, 66 N. W. 780; *Milburn Mfg. Co. v. Peak*, 89 Tex. 209, 34 S. W. 102; *Holleman v. Fertilizer Co.*, 106 Ga. 156, 32 S. E. 83; *Commonwealth v. Parlin & Orendorff Co.*, 118 Ky. 168, 80 S. W. 791.

Where the owner of a cheese factory agreed with dairymen to manufacture their milk into butter and cheese at a certain rate per pound, he to sell the product and pay them the proceeds, less his compensation, in proportion to the amount of milk furnished by each, the transaction was not a sale of the milk to him, but he was simply their agent. *First Nat. Bank v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174. See, also, *Sattler v. Hallock*, 100 N. Y. 201, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686.

language of, or are described by the parties as, contracts of agency, are in legal effect contracts of sale,⁵⁴ and, on the other hand, contracts which use the language of sale are often in legal effect contracts of agency.⁵⁵

Same—Agency to Buy.

If a person is employed to buy goods on behalf of another, the relation is, of course, that of principal and agent.⁵⁶ But, if it is the intention that the one is to buy on his own behalf and to sell the goods to the other, the transaction is a contract to sell.⁵⁷

⁵⁴ Henry Bill Pub. Co. v. Durgin, 101 Mich. 458, 59 N. W. 812; Mack v. Tobacco Co., 48 Neb. 397, 67 N. W. 174, 58 Am. St. Rep. 691; Chickering v. Pastress, 130 Ill. 208, 22 N. E. 542, 17 Am. St. Rep. 309; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Norwegian Plow Co. v. Clark, 102 Iowa, 31, 70 N. W. 808; Alpha Check-Rower Co. v. Bradley, 105 Iowa, 537, 75 N. W. 369; Butterick Pub. Co. v. Bailey, 75 Iowa, 189, 75 N. W. 189; Weston v. Brown, 158 N. Y. 390, 53 N. E. 36; Roosevelt v. Nusbaum, 75 App. Div. 117, 77 N. Y. Supp. 457; Sutton v. Baker, 91 Minn. 12, 97 N. W. 420; Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 834; Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496; Howell v. Boudar, 95 Va. 815, 30 S. E. 1007.

Where goods are consigned on such terms that the consignee is at liberty to sell on such terms as he sees fit, but must in such case pay the consignor at fixed prices, until a sale is made the property remains in the consignor, but when he sells the property passes to him, and he sells on his own account, and not as agent. *Ex parte White*, L. R. 6 Ch. App. 397; *In re Nevill*, Id.; *Nutter v. Wheeler*, 2 Low. (U. S.) 348, Fed. Cas. No. 10,384; *Gindre v. Kean*, 28 N. Y. Supp. 4, 7 Misc. Rep. 582; *Ætna Powder Co. v. Hildebrand*, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; *Vermont Marble Co. v. Brow*, 109 Cal. 236, 41 Pac. 1031; 50 Am. St. Rep. 37. Cf. *Harris v. Coe*, 71 Conn. 157, 41 Atl. 552.

⁵⁵ *Eldridge v. Benson*, 7 Cush. (Mass.) 483; *Atlas Glass Co. v. Manufacturing Co. (C. C.)* 87 Fed. 418.

⁵⁶ *Whitney v. Beckforth*, 105 Mass. 267; *National School Furnishing Co. v. Cole*, 30 Ill. App. 156; *Hatch v. McBrien*, 83 Mich. 159, 47 N. W. 214; *Keswick v. Rafter*, 35 App. Div. 506, 54 N. Y. Supp. 850, affirmed 165 N. Y. 653, 59 N. E. 1124.

⁵⁷ *Black v. Webb*, 20 Ohio, 804, 55 Am. Dec. 456. See, also, *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Baring v. Galpin*, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

Where Transfer is Not for a Price—Gift.

If the transfer of the property in goods is without consideration, the transaction is a gift. A gift differs from a sale, also, in that delivery is essential to effect a gift.⁵⁵

Same—Exchange.

If the consideration for the transfer of the property in goods consists of other goods, no price being fixed for either, the transaction is an exchange or barter.⁵⁶ The legal effect of a contract of exchange is, however, generally the same as that of a contract of sale.⁵⁷ The principal difference is in respect to the form of pleading and the measure of damages, since in the case of an exchange the declaration must be for damages for the breach of the special contract, and not in assumpsit for goods sold, or goods sold and delivered.⁵⁸ And authority to sell does not confer authority to exchange.⁵⁹ The distinction may also be material in interpreting a statute which refers in terms to sales.⁶⁰ A contract of exchange is held to be a con-

⁵⁵ *Noble v. Smith*, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399; *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; *Cochrane v. Moore*, 25 Q. B. Div. 57.

⁵⁶ *Harrison v. Luke*, 14 Mees. & W. 139; *Read v. Hutchinson*, 3 Camp. 352; *Williamson v. Berry*, 8 How. (U. S.) 495, 544, 12 L. Ed. 1170; *Mitchell v. Gile*, 12 N. H. 390; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Dowling v. McKenney*, 124 Mass. 480.

Sales Act, § 9 (2), abolishes the distinction between sale and barter. Cf. section 9 (3).

Where a note is taken in conditional payment, the transaction is a sale, and not an exchange. *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316.

⁵⁷ *Com. v. Clark*, 14 Gray (Mass.) 367, per Bigelow, J., 372. See *Emanuel v. Dane*, 3 Camp. 299 (warranty); *La Neuville v. Nourse*, Id. 351 (caveat emptor); *First Nat. Bank v. Reno*, 73 Iowa, 145, 34 N. W. 796.

⁵⁸ *Harris v. Fowle*, cited in *Barbe v. Parker*, 1 H. Bl. 287; *Mitchell v. Gile*, 12 N. H. 390; *Vall v. Strong*, 10 Vt. 457; *Herrick v. Carter*, 56 Barb. (N. Y.) 41; *Slayton v. McDonald*, 73 Me. 50. Otherwise where the contract of exchange is for goods at a stipulated price, *Forsyth v. Jervis*, 1 Starkie, 437; *Hands v. Burton*, 9 East, 349; *Harrison v. Luke*, 14 Mees. & W. 139; *Way v. Wakefield*, 7 Vt. 228; *Picard v. McCormick*, 11 Mich. 69; or where the exchange is only partly for goods, and the action is to recover the money balance after delivery of the goods, *Sheldon v. Cox*, 3 Barn. & C. 420.

⁵⁹ See *Tiffany*, Ag. pp. 207, 223.

⁶⁰ Proof of barter does not support an indictment charging sale of

tract of sale within the statute of frauds.⁶⁴ And in cases where goods are delivered, and the receiver is to deliver other goods in return, so that the property passes, the courts generally describe the transaction as a sale.⁶⁵

Contract for Work, Labor, and Materials.

A distinction is sometimes drawn between a contract to sell goods and a contract for work, labor, and materials. The distinction is chiefly important in determining whether the contract is one "for the sale of goods" within the statute of frauds, and for determining this question different rules prevail in different jurisdictions, which will be considered hereafter.⁶⁶ The question may be otherwise material,⁶⁷ however; for example, as affecting the form of pleading and the measure of damages,⁶⁸ or the time when the property passes.⁶⁹

CAPACITY OF PARTIES.

6. **IN GENERAL.** Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.
7. **NECESSARIES.** Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.⁷⁰

liquor. *Stevenson v. State*, 65 Ind. 400; *Massey v. State*, 74 Ind. 368.

A sale is not within the meaning of a statute declaring illegal the sale of a slave by a trader without a license. *Gunter v. Lechey*, 30 Ala. 596.

But in Massachusetts an exchange has been held to be a sale within the meaning of a statute prohibiting the sale of liquor. *Howard v. Harris*, 8 Allen (Mass.) 207; *Com. v. Clark*, 14 Gray (Mass.) 367.

⁶⁴ Post, p. 71.

⁶⁵ Ante, p. 6.

⁶⁶ Post, p. 62.

⁶⁷ See *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285.

⁶⁸ *Garvin Mach. Co. v. Hutchinson*, 1 App. Div. 380, 37 N. Y. Supp. 304.

⁶⁹ *Central Lith. & Eng. Co. v. Moore*, 75 Wis. 170, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186; *Fairbanks v. Drug Co.*, 42 Mo. App. 262; post, p. 848.

⁷⁰ These two sections follow Sales Act, § 2.

The capacity of persons to buy and sell is generally determined by their capacity to contract, upon which subject the reader is referred to works upon contract. "Capacity to contract must be distinguished from authority to contract. Capacity means power to bind oneself; authority means power to bind another. * * * Capacity is usually a question of law; authority is usually a question of fact. As regards authority to buy and sell on behalf of another, there appears to be nothing peculiar in the law of sales, except the provisions of the factors' acts."⁷¹ On the subject of authority, therefore, the reader is referred to works on the law of agency and partnership.⁷² There are, however, certain classes of persons, in part incapable of contracting, who, under special circumstances, may become liable for goods sold and delivered to them. The persons embraced in this exception are infants, lunatics, and intoxicated persons.

The obligation of such persons to pay for necessities furnished to them is, however, quasi contractual, rather than contractual,⁷³ as is shown by the fact that it is generally held that they are liable to pay, not the price, but their reasonable value.⁷⁴

CAPACITY OF INFANTS.

8. Contracts of sale and purchase by an infant are voidable, at his option, either before or after he has attained his majority. The contract ceases to be voidable if it be ratified upon the attainment of his majority.

The general rule of the common law is that an infant's contract is voidable, at his option, either before or after he has attained his majority.⁷⁵ Thus an infant may maintain an action

⁷¹ Chalm. Sale of Goods Act (6th Ed.) 11.

⁷² See Sales Act, § 78.

⁷³ In re Rhodes, 44 Ch. Div. 94; Clark, Cont. (2d Ed.) 155, 547.

⁷⁴ Post, p. 21.

⁷⁵ Gibbs v. Merrill, 8 Taunt. 307; Hunt v. Massey, 5 Barn. & Adol. 902; Holt v. Clarendieux, 2 Strange, 938; Zouch v. Parsons, 3 Burrows, 1794; King v. Inhabitants of Chillesford, 4 Barn. & C., at page 100; Tucker v. Moreland, 10 Pet. (U. S.) 64, 9 L. Ed. 345. See Pol. Cont. 52 et seq. Emancipation by his father does not enlarge the in-

on the contract against the seller during infancy.⁷⁶ He may buy and sell, but either sale⁷⁷ or purchase⁷⁸ may be avoided by him, and if he avoids either he may recover back the consideration.⁷⁹ In case of avoidance he must, however, return the consideration which he received, if he still has it; though if he has consumed, lost, or sold it during minority, he may nevertheless avoid the purchase or sale.⁸⁰ Such at least is the law generally recognized in America,⁸¹ though in England his right

infant's liability. *Mason v. Wright*, 18 Metc. (Mass.) 306. See *Clark, Cont.* (2d Ed.) 144.

⁷⁶ *Warwick v. Bruce*, 2 Maule & S. 205; *Holt v. Clarendieux*, 2 Strange, 937.

⁷⁷ *Shipman v. Horton*, 17 Conn. 481; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Towle v. Dresser*, 73 Me. 252; *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166.

⁷⁸ *Riley v. Mallory*, 33 Conn. 201; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *McCarthy v. Henderson*, 138 Mass. 310; *Robinson v. Weeks*, 56 Me. 102; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476.

⁷⁹ Cases cited *supra*, notes 77, 78.

⁸⁰ *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Walsh v. Young*, 110 Mass. 396; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 28 Am. St. Rep. 263; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 118 Ind. 571, 15 N. E. 12; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Brantley v. Wolf*, 60 Miss. 420; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *White v. Cotton-Waste Corp.*, 178 Mass. 20, 59 N. E. 642; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265.

Where an infant bought of another infant and paid the price, and after the seller had spent the money the buyer disaffirmed the contract and brought an action to recover the money paid, both in contract and tort, it was held that the defendant's plea of infancy was a defense to the count in contract, and there was no dealing with the money by the defendant which could constitute a conversion. *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

⁸¹ The decisions on this point, however, are not uniform. See *Heath v. Stevens*, 48 N. H. 251, where it is held that the infant's

to avoid an executed sale and recover back the price is denied.⁸²

Ratification.

The contract of an infant ceases to be voidable if it be ratified by him after attaining his majority.⁸³ By statute in some

right to avoid the contract is conditional on his restoring what he received in specie, or, if not, on his accounting for the value of it. See, also, *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408; *Riley v. Mallory*, 83 Conn. 201; *Adams v. Beall*, 67 Md. 53, 8 Atl. 604, 1 Am. St. Rep. 379; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350.

Where the personal contract of an infant is fair and reasonable, and free from fraud or undue influence, and has been wholly or partly performed on both sides, so that the infant has enjoyed the benefits of it, but has parted with what he has received, or the benefits are of such a nature that he cannot restore them, he cannot recover back what he has paid. *Johnson v. Insurance Co.*, 56 Minn. 365, 57 N. W. 934; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9.

Where an infant who had purchased a bicycle on installments, and paid part of the price, under an agreement that title should not pass from the seller until all installments were paid, afterwards disaffirmed the contract, she was not entitled to recover the installments paid, since as to them the contract was executed, though the contract in its entirety was executory. *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 686. Cf. *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; *Clark, Cont.* (2d Ed.) 171.

⁸² "If an infant pays money under a contract, in consideration of which it is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding when he comes of age." *Pol. Cont.* 60; *Leake, Cont.* 553. The authorities principally relied on are *Holmes v. Blogg*, 8 Taunt. 508, which is generally repudiated by the American cases above cited, and *Ex parte Taylor*, 8 De Gex, M. & G. 258. See, also, *Williams v. Pasquall, Peake, Add. Cas.* 197, per *Kenyon, C. J.*; *Valentini v. Canali*, 24 Q. B. Div. 166. In *Ex parte Taylor*, Lord Justice Turner said: "If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority he cannot, on attaining his majority, recover the money back."

By the infants' relief act of 1874 (St. 37 & 38 Vict. c. 62) contracts entered into by infants supplied or to be supplied, other than for necessities, are void. *Benj. Sales* (7th Am. Ed.) § 28.

⁸³ *Williams v. Moor*, 11 Mees. & W. 256; *Anson, Cont.* 105; *Clark, Cont.* (2d Ed.) 160.

states the ratification is required to be in writing;⁸⁴ but in most states no writing is necessary, and the ratification may be either by express language amounting to a new promise, as distinguished from a mere acknowledgment of the debt,⁸⁵ or by conduct, as by using or selling the thing sold.⁸⁶ Mere silence or failure to disaffirm does not constitute ratification.⁸⁷

Contract for Necessaries.

An infant may procure necessaries, and be held liable for their reasonable value.⁸⁸ The necessaries of an infant are stated in Co. Litt. 172, to be "his necessary meat, drinke, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But the term includes also articles purchased for real use, although ornamental, as distinguished from such as are merely ornamental;⁸⁹ and it has been said "that articles of mere luxury are always excluded, though articles of lux-

⁸⁴ Clark, Cont. (2d Ed.) 168. Previous to the infants' relief act of 1874 (St. 37 & 38 Vict. c. 62), by which radical changes are made in the law governing contracts by infants, a writing was required in England. See Benj. Sales (7th Am. Ed.) § 27 et seq.

⁸⁵ Ford v. Phillips, 1 Pick. (Mass.) 202; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Proctor v. Sears, 4 Allen (Mass.) 95; Wilcox v. Roath, 12 Conn. 550; Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249; Clark, Cont. (2d Ed.) 167.

⁸⁶ Boyden v. Boyden, 9 Metc. (Mass.) 519; Lawson v. Lovejoy, 8 Greenl. (Me.) 405, 23 Am. Dec. 526; Boody v. McKenney, 23 Me. 517; Deason v. Boyd, 1 Dana (Ky.) 45; Robinson v. Hoskins, 14 Bush. (Ky.) 893; Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735; Minock v. Shortridge, 21 Mich. 304; Philpot v. Manufacturing Co., 18 Neb. 54, 24 N. W. 428; Langdon v. Clayson, 75 Mich. 204, 42 N. W. 805; Hilton v. Shepherd, 92 Me. 160, 42 Atl. 387; Clark, Cont. (2d Ed.) 168.

⁸⁷ Smith v. Kelley, 13 Metc. (Mass.) 309; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521; Tyler v. Gallop's Estate, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Clark, Cont. (2d Ed.) 168.

⁸⁸ It has sometimes been laid down, in general terms, that, if an agreement be for the benefit of the infant, it is binding. See Pol. Cont. 66; Clark, Cont. (2d Ed.) 150. In America the exception is confined to necessaries. But see Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408.

⁸⁹ Peters v. Fleming, 6 Mees. & W. 42; Ryder v. Wombwell, L. R. 3 Exch. 90.

various utility are in some cases allowed." ** The word "necessaries" must, therefore, be regarded as a relative term, to be construed with reference to the infant's age, state, and condition.[†] An infant, being considered in law as devoid of sufficient dis-

** *Chapple v. Cooper*, 18 Mees. & W. 256, per Alderson, B.

† *Peters v. Fleming*, 6 Mees. & W. 46; *Wharton v. Mackenzie*, 5 Q. B. 606; *Davis v. Caldwell*, 12 Cush. (Mass.) 513; *Tyler, Inf.* (2d Ed.) § 69 et seq. An enumeration of the various things which have been decided to be necessary or not necessary would be of comparatively little value, since the question, though to a great extent for the court, is one of judicial common sense in each particular case. The subjoined cases are cited for illustration. The following articles have been held not to be necessities: A silver goblet for a gift. *Ryder v. Wombwell*, L. R. 3 Exch. 90, L. R. 4 Exch. 32. A collegiate education, in the absence of special circumstances. *Middlebury College v. Chandler*, 16 Vt. 686, 42 Am. Dec. 537. Traveling expenses for pleasure. *McKanna v. Merry*, 61 Ill. 177. A bicycle used in going home from the infant's place of work to dinner. *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775. It has been decided that the following things might be necessities: A livery for a servant. *Hinds v. Slaney*, 8 Term R. 578. A regimental uniform for a member of a volunteer corps. *Coates v. Wilson*, 5 Esp. 152. A horse, when required by the infant's position or health, *Hart v. Prater*, 1 Jur. 623; but not generally, *Smithpeters v. Griffin*, 10 B. Mon. (Ky.) 259; *Beeler v. Young*, 1 Bibb. (Ky.) 519; *Harrison v. Fane*, 1 Man. & G. 550; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407. A watch and jewelry, relatively to the infant's position. *Peters v. Fleming*, 6 Mees. & W. 46. See *Berolles v. Ramsay*, Holt, N. P. 77. A wedding suit. *Sams v. Stockton*, 14 B. Mon. (Ky.) 232. A lawsuit. *Thrall v. Wright*, 38 Vt. 494. Attorney's fees for defense in a bastardy process, *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; or in prosecuting an action for seduction, *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; or in prosecuting or defending criminal prosecution, *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Crafts v. Carr*, 24 R. I. 307, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; or in litigation relative to the infant's property, *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434 (*Phelps v. Worcester*, 11 N. H. 51, contra). It has been decided that the following things were not necessities: Dinners supplied to an undergraduate at his rooms, in the absence of special circumstances. *Brooker v. Scott*, 11 Mees. & W. 67; *Wharton v. Mackenzie*, 5 Q. B. 606. Cigars and tobacco, *prima facie*. *Bryant v. Richardson*, L. R. 3 Exch. 93, note 3, 14 Law T. (N. S.) 24. Repairs on dwelling house needed to prevent serious injury. *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909.

cretion to carry on a trade or business, is not liable for goods supplied to him for his trade or business, whether he is trading alone or in partnership.⁹³ But, if married, his duties as husband and father are the same as if he were of full age, and things necessary for his wife and children are deemed necessities for himself.⁹⁴

It is obvious that an article such as a diamond or a race horse may be intrinsically incapable of being a necessary, and that another article, though not intrinsically incapable of being a necessary, may fail of being such by reason of the circumstances of the case; for example, the age or condition of the infant, the quantity in which it is supplied,⁹⁵ or the fact that his wants are suitably supplied by his parent or guardian, or from any other source.⁹⁶ The principal difficulty in respect to necessities

⁹³ *Whywall v. Champion*, 2 Strange, 1083; *Dilk v. Kelghley*, 2 Esp. 480; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524, 10 Am. Dec. 637; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 85 Am. Rep. 189; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557; *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109. But in *Mohney v. Evans*, 51 Pa. 80, the question whether farming supplies were necessities was left to the jury, and, if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable on what is so used. *Turberville v. Whitehouse*, 1 Car. & P. 94.

⁹⁴ *Turner v. Trisby*, 1 Strange, 168; *Rainsford v. Fenwick*, Cart. 215; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 562, 46 Am. Dec. 704; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Cantine v. Phillips*, 5 Har. (Del.) 428; *Price v. Sanders*, 60 Ind. 311.

⁹⁵ *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Nicholson v. Wilborn*, 13 Ga. 467.

⁹⁶ *Cook v. Deaton*, 3 Car. & P. 114; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Brooker v. Scott*, 11 Mees. & W. 67; *Swift v. Bennett*, 10 Cush. (Mass.) 436, 437; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Trainer v. Trumbull*, 141 Mass. 527, 16 N. E. 761; *Walling v. Toll*, 9 Johns. (N. Y.) 141; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; *Hull's Assignees v. Connolly*, 3 McCord (S. C.) 6, 15 Am. Dec. 612; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 655; *Atchison v. Bruff*, 50 Barb. (N. Y.) 381; *Perrin v. Willson*, 10 Mo. 451; *McKanna v. Merry*, 61 Ill. 177; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 832, 26 L. R. A. 177, 42 Am. St. Rep. 665. If the infant was already sufficiently supplied, it is immaterial that the seller was ignorant of the fact. *Brayshaw v. Eaton*, 7 Scott, 183; *Barnes v. Toye*, 13 Q. B. Div. 414; *Johnstone v. Marks*, 19 Q. B.

consists in determining the province of the court and jury in ascertaining them. It is frequently stated in the American cases that the question whether articles come within the class of necessities is for the court, and that the question whether they were necessities in fact is for the jury.⁹⁶ In England it has been settled that the question whether the articles were necessities is one of fact, and therefore for the jury; but that, like other questions of fact, it should not be left to the jury unless there is evidence on which they can reasonably find in the affirmative.⁹⁷ Practically, there is little difference in the two rules, for the cases involving articles intrinsically incapable of being necessities are rare, and the question in most cases depends on the particular circumstances. It is impossible, therefore, in most cases, for the judge to say whether articles are within the class of necessities, without taking into consideration the circumstances of the case; and if he determines that the articles do not, under the circumstances, come within the class, he in effect determines that there is not evidence on which the jury could reasonably find them to be necessities. The

Div. 509; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542. But having an income out of which the infant might keep himself supplied is not equivalent to being actually supplied. *Burghart v. Hall*, 4 Mees. & W. 727; *Nicholson v. Willborn*, 13 Ga. 469; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274.

The complaint, in an action against an infant to recover for board furnished her, is not demurrable because it does not allege that the father or other person standing in loco parentis had refused or was unable to pay for the board furnished, or that there were no persons who could and should support her. *Goodman v. Alexander*, 105 N. Y. 280, 59 N. E. 145, 55 L. R. A. 781.

See Sales Act, § 2.

⁹⁶ *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 563, 46 Am. Dec. 704; *Merrillam v. Cunningham*, 11 Cush. (Mass.) 40, 44; *Bent v. Manning*, 10 Vt. 225; *Stanton v. Willson*, 3 Day (Conn.) 37, 56, 3 Am. Dec. 255; *Glover v. Ott*, 1 McCord (S. C.) 572; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *McKanna v. Merry*, 61 Ill. 177.

⁹⁷ *Ryder v. Wombwell*, L. R. 3 Exch. 93, L. R. 4 Exch. 82. See, also, *Peters v. Fleming*, 6 Mees. & W. 42; *Wharton v. Mackenzie*, 5 Q. B. 606; *Davis v. Caldwell*, 12 Cush. (Mass.) 512, per Shaw, C. J.; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Mohney v. Evans*, 51 Pa. 80.

burden of proving that the articles were necessities is on the plaintiff.⁹⁸

The obligation of the infant to pay for necessities being quasi contractual, he is liable without an express contract.⁹⁹ And, although he agrees to pay a stipulated price, the amount for which he can be held liable is not the agreed price, but the reasonable value of the goods.¹⁰⁰ Even if he gives his note in payment, the seller can recover thereon no more than what the goods were worth.¹⁰¹

In some states, where a father fails to support his infant child, the child has a right upon his father's credit to supply himself with necessities; but it is very generally held that a father is not liable for necessities supplied to the child without his authority.¹⁰²

CAPACITY OF LUNATICS AND DRUNKEN MEN.

9. A contract of sale or of purchase by a lunatic or drunken man, or other person non compos mentis, is voidable at his option, if at the time of making the contract he was incapable of understanding its effect.

EXCEPTION—In most jurisdictions the sale or purchase is not voidable if the other party did not know, or have reasonable cause to know, the condition of the lunatic or drunken man, and if the contract has been so far executed that the other party cannot be restored to his former position.

⁹⁸ Thrall v. Wright, 38 Vt. 494; Wood v. Losey, 50 Mich. 475, 15 N. W. 557; Nicholson v. Wilborn, 13 Ga. 467, 475.

⁹⁹ Trainer v. Trumbull, 141 Mass. 530, 6 N. E. 761; Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

¹⁰⁰ Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Vent v. Osgood, 19 Pick. (Mass.) 572, 575; Locke v. Smith, 41 N. H. 346; Beeler v. Young, 1 Bibb (Ky.) 519; Bouchell v. Clary, 3 Brev. (S. C.) 194; Trainer v. Trumbull, supra; Gregory v. Lee, supra.

¹⁰¹ Earle v. Reed, 10 Metc. (Mass.) 387; Bradley v. Pratt, 23 Vt. 378; Guthrie v. Morris, 22 Ark. 411. Some cases hold the note void. Swasey v. Vanderheyden's Adm'r, 10 Johns. (N. Y.) 33; McMinn v. Richmond, 6 Yerg. (Tenn.) 9; Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759. See Byles, Bills (7th Am. Ed.) 61.

¹⁰² Tiffany, Ag. 41.

Lunatics.

The general rule of the common law is that the contract of a lunatic or other person non compos mentis, like that of an infant, is not void, but is voidable at his option.¹⁰³ Thus, it may be ratified or disaffirmed by the lunatic on recovery of his sanity,¹⁰⁴ or by his guardian or other representative,¹⁰⁵ but not by the other party.¹⁰⁶

The principal difference between the contract of a lunatic and that of an infant is that if the other party did not know, or have reasonable cause¹⁰⁷ to know, of the lunatic's condition of mind, and acted in good faith, and the contract has been so far executed that the parties cannot be placed in statu quo, it cannot be avoided. The leading case on this point is *Molton v. Camroux*,¹⁰⁸ the principle of which has generally, though not uni-

¹⁰³ *Molton v. Camroux*, 2 Exch. 487, 4 Exch. 17; *Matthews v. Baxter*, L. R. 8 Exch. 132; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Carrier v. Sears*, 4 Allen (Mass.) 336, 81 Am. Dec. 707; *Chew v. Bank of Baltimore*, 14 Md. 299; *Ingraham v. Baldwin*, 9 N. Y. 45; Pol. Cont. 91; *Bish. Cont.* 618; *Clark, Cont.* (2d Ed.) 178, 2 Kent, Comm. 451; *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Ætna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 431. But see *Dexter v. Hall*, 15 Wall. (U. S.) 9, 21 L. Ed. 73; *Parker v. Mar-co (C. C.)* 76 Fed. 510.

¹⁰⁴ *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Turner v. Rusk*, 53 Md. 65.

¹⁰⁵ *McClain v. Davis*, 77 Ind. 419; *Halley v. Troester*, 72 Mo. 73; *Moore v. Hershey*, 90 Pa. 196; *Flint v. Valpey*, 130 Mass. 385.

¹⁰⁶ *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309.

¹⁰⁷ *Beavan v. McDonnell*, 10 Exch. 184; *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthlessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 530, 544.

¹⁰⁸ 2 Exch. 487, 4 Exch. 17, Ewell, Lead. Cas. 614. See, also, *Beavan v. McDonnell*, 9 Exch. 309, 10 Exch. 184; *Elliot v. Ince*, 7 De Gex, M. & G. 475, 487; *Drew v. Nunn*, 4 Q. B. Div. 661; *Niell v. Morley*, 9 Ves. 478, Ewell, Lead. Cas. 628.

In *Molton v. Camroux* it was said: "The modern cases show that when the state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original position." The distinction between executory and executed contracts, however, appears to have been repudiated in

versally, been followed in this country.¹⁰⁹ This has been called a decision of necessity, as a contrary doctrine would render all ordinary dealings between man and man unsafe.¹¹⁰ If, however, the lunatic restores, or offers to restore, the consideration which he has received, the necessity ceases, and he may avoid the contract.¹¹¹ The contractual capacity of a lunatic or insane person under guardianship depends upon statute, and differs in different states.¹¹²

England, where the more recent rule appears to be that the contract of a lunatic is binding unless the other party knew of his condition. *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 599. See *Anson, Cont.* (8th Ed.) 120.

¹⁰⁹ *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Mutual Life Ins. Co. v. Hunt*, 14 Hun, 169, 79 N. Y. 541; *Ballard v. McKenna*, 4 Rich. Eq. (S. C.) 358; *Matthiessen & Welchers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Wilder v. Weakley*, 34 Ind. 181; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Alexander v. Haskins*, 68 Iowa, 73, 25 N. W. 935; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Burnham v. Kidwell*, 113 Ill. 425; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; *Leavitt v. Files*, 38 Kan. 28, 15 Pac. 891; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214. The leading case against this doctrine is *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Ewell*, Lead. Cas. 610. See, also, *Gibson v. Soper*, 6 Gray (Mass.) 279, 68 Am. Dec. 414; *Brigham v. Fayerweather*, 144 Mass. 52, 10 N. E. 735; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Edwards v. Davenport* (C. C.) 20 Fed. 756; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937. In *Crawford v. Scovell*, 94 Pa. 48, 30 Am. Rep. 766, *Trunkay, J.*, says: "In this country that rule is not universally extended to sales of personalty, and is not applied to conveyances of real estate." In several of the cases above cited, however, it is applied to conveyances.

¹¹⁰ *Elliot v. Ince*, 7 De Gex, M. & G. 475, per Lord Cranworth.

¹¹¹ *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. 383; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.

¹¹² *Rish. Cont.* § 977; *Clark, Cont.* (2d Ed.) 182.

Drunken Men.

The rules in regard to the contracts of a man who is so intoxicated as not to know what he is doing are the same.¹¹³ His contracts are voidable, but not void, and hence may be ratified by him when sober.¹¹⁴

Necessaries.

A lunatic is liable for necessities furnished him.¹¹⁵ As in the case of an infant, "necessaries" embrace articles suitable to his condition and degree,¹¹⁶ but in the case of a lunatic the term would probably be more liberally construed.¹¹⁷ It seems that a drunken man also is liable for necessities.¹¹⁸

¹¹³ Pol. Cont. 87; Bish. Cont. § 979; Clark, Cont. (2d Ed.) 186.

¹¹⁴ *Matthews v. Baxter*, L. R. 8 Exch. 132 (pointing out that "void," as used in *Gore v. Gibson*, 13 Mees. & W. 623, Ewell, Lead. Cas. 734, must be taken to mean "voidable"); *Molton v. Camroux*, 4 Exch. 17; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; *Broadwater v. Darne*, 10 Mo. 277; Bish. Cont. § 985; Clark, Cont. (2d Ed.) 186.

In *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737, it is held that the contract is void.

¹¹⁵ *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170; *Bagster v. Same*, 7 Dow. & R. 614; *Manby v. Scott*, 1 Sid. 112; *Dane v. Kirkwall*, 8 Car. & P. 679; *Wentworth v. Tubb*, 1 Younge & C. Ch. 171; *Williams v. Wentworth*, 5 Beav. 325; *Nelson v. Duncombe*, 9 Beav. 211; *Richardson v. Strong*, 35 N. C. 106, 55 Am. Dec. 430; *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Sawyer v. Lufkin*, 56 Me. 308; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *Kendall v. May*, 10 Allen (Mass.) 59; *Skidmore v. Romaine*, 2 Bradf. Sur. (N. Y.) 122; *Barnes v. Hathaway*, 66 Barb. (N. Y.) 453; *Blaisdell v. Holmes*, 48 Vt. 492; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *In re Renz*, 79 Mich. 216, 44 N. W. 598; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460. See *In re Rhodes*, 44 Ch. Div. 94 (showing that the obligation is quasi contractual). And see Sales Act, § 2.

¹¹⁶ *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170; *Bagster v. Same*, 7 Dow. & R. 614; *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Richardson v. Strong*, 35 N. C. 106, 55 Am. Dec. 430.

¹¹⁷ *Kendall v. May*, 10 Allen (Mass.) 59. See in *re Persse*, 3 Malloy, 94.

¹¹⁸ *Gore v. Gibson*, 13 Mees. & W. 623, per Pollock, C. B., and Alderson, B. See, also, *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

CAPACITY OF MARRIED WOMEN.

10. At common law contracts of sale and purchase by married women are in general void; but the capacity of married women to contract has generally been extended by statute.

Although the common-law capacity, or rather incapacity, of a married woman to buy and sell is coextensive with her general capacity or incapacity to contract, and the subject therefore falls rather within the law of contract and of married women than of sale, a few words on the subject may not be out of place. At common law a married woman is incompetent to contract.¹¹⁹ A contract with her is not, as in the case of an infant or lunatic, merely voidable, but is void,¹²⁰ and hence is incapable of ratification upon termination of coverture.¹²¹ She cannot, even while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase, on her own account, even of necessities.¹²² To the general rule of her incapacity to contract, however, there are several exceptions: (1) When the husband is civiliter mortuus (that is, dead in law, as when he is under sentence of penal servitude, transportation, or banishment), her disability is suspended,¹²³ and, according to some authorities, it is suspended when he is an alien and resident abroad.¹²⁴ (2) By the custom of the city of London, a married woman might

¹¹⁹ Co. Litt. 112d.

¹²⁰ Anson, Cont. (4th Ed.) 117; Bish. Cont. § 949; Clark, Cont. (2d Ed.) 188; Schouler, Husb. & Wife, §§ 97, 98.

¹²¹ Zouch v. Parsons, 3 Burrows, 1704; Clark, Cont. (2d Ed.) 141; Schouler, Husb. & Wife, § 99. There are, however, some authorities which hold that the moral consideration is sufficient to support a promise after termination of coverture. *Lee v. Muggeridge*, 5 Taunt. 36. *Ewell*, Lend. Cas. 322, 331; *Stew. Husb. & Wife*, § 366.

¹²² *Marshall v. Rutton*, 8 Term R. 545.

¹²³ *Benj. Sales*, § 32; *Stew. Husb. & Wife*, § 358; *Clark, Cont.* (2d Ed.) 189.

¹²⁴ *Benj. Sales*, §§ 33, 34; *Stew. Husb. & Wife*, § 358; *Gregory v. Paul*, 15 Mass. 31; *McArthur v. Bloom*, 2 Duer (N. Y.) 151. So where the husband was a citizen and resident in another state. *Abbot v. Bayley*, 6 Pick. (Mass.) 89.

trade, and for that purpose might make valid contracts.¹²⁵ (3) In equity, when a married woman has separate property, she may, under certain circumstances, contract so as to render it liable.¹²⁶ It is to be noticed that the exceptions to the incapacity of married women to contract are not confined, as is the exception in the case of infants and lunatics, simply to purchases of necessities, but that it extends to their general contractual capacity.

A husband is bound to maintain his wife and to supply her with necessities, and if he fails in this duty she has the power to pledge his credit for the purpose of supplying herself. The foundation of his liability is the duty of support, and his obligation is one of quasi contract, and is distinct from that which arises when he has conferred authority upon his wife to pledge his credit.¹²⁷

The common law in regard to the contractual capacity of married women has been radically changed by legislation in England¹²⁸ and in most of the states of this country,¹²⁹ and in many states her disability to contract has been wholly removed. These statutory provisions differ greatly among themselves, and a consideration of the statutory capacity of married women to buy and sell cannot be here attempted.

WHO CAN SELL.

11. As a rule, no person can sell personal property, so as to convey a valid title thereto, unless he be the owner.

EXCEPTIONS—(1) In England, but not in the United States, where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of defect of title on the part of the seller.¹³⁰

¹²⁵ *Beard v. Webb*, 2 Bos. & P. 96; *Benj. Sales*, § 35.

¹²⁶ *Anson, Cont.* (4th Ed.) 118; *Clark, Cont.* (2d Ed.) 190; *Schouler, Husb. & Wife*, § 189 et seq.

¹²⁷ *Tiffany, Ag.* 40.

¹²⁸ *Benj. Sales*, § 37 et seq.

¹²⁹ *Stim. Am. St. Law*, § 6482.

¹³⁰ *The Case of Market-Overt*, 5 Coke, 83b; *Tud. Merc. Cas.* (3d

- (2) Where a promissory note, bill of exchange, or other negotiable instrument payable to bearer or indorsed in blank is negotiated by the holder before maturity to a bona fide purchaser for value without notice, the purchaser acquires a good title to the instrument.
- (3) A person who is not the owner of goods may sell them, so as to pass the title of the owner, if he acts under the authority or with the consent of the owner, or under any special common-law or statutory power of sale, or under the order of a court of competent jurisdiction.¹⁸¹
- (4) A sale made by a person not thereto authorized may be good as against the owner by estoppel, where the owner by his words or conduct is precluded from denying the seller's ownership or authority to sell.
- (5) In some jurisdictions a person who has sold goods, but who continues in the possession thereof, can transfer the property therein to a bona fide purchaser, who obtains possession of the goods, notwithstanding the prior sale.
- (6) By statute in England and in many states, purchasers from factors and other agents intrusted with and in possession of goods, or of the documents of title to goods, may under certain circumstances acquire good title to the goods, although the factor or agent is not authorized to sell.
- (7) When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer, in general, acquires a good title, provided he buys them in good faith, for value, and without notice of the seller's defect of title.¹⁸²

In General.

Not only must the parties to a sale be capable of contracting, but the seller must (subject to the exceptions mentioned) be the owner of the thing sold; for, as a rule, no one can pass to the buyer a better title than he himself possesses. "Nemo dat quod non habet."¹⁸³ A person, therefore, however innocent,

Ed.) p. 274; *Crane v. Dock Co.*, 5 Best & S. 813, 33 Law J. Q. B. 224, 229; *Benj. Sales*, § 8 et seq.; *Sale of Goods Act*, § 22.

¹⁸¹ See *Sales Act*, § 23 (1), (2) (b); *Sale of Goods Act*, § 21 (1), (2) (b).

¹⁸² *Sales Act*, § 24; *Sale of Goods Act*, § 23.

¹⁸³ *Peer v. Humphrey*, 2 Adol. & E. 495; *Whistler v. Forster*, 82 Law J. C. P. 161; *Cooper v. Willomatt*, 1 C. B. 672, 14 Law J. C. P.

why buys goods from one not the owner, obtains, in general, no property in them whatever; and even if, in ignorance that the goods were lost or stolen, he resells them in good faith to a third person, he remains liable in trover to the original owner.¹³⁴

It is to be observed that, in the cases covered by the first and second exceptions, the buyer, like one who in good faith receives money in payment,¹³⁵ obtains a good title as against all the world—that is, even against one who has lost the thing sold, or from whom it has been stolen—while in the cases covered by the other exceptions the buyer simply obtains the title (if any) of a particular person, who may or may not be the true owner, without prejudice to the rights of any person who may in fact have a superior title.

Market Overt.

The rules of market overt apply only to a limited class of retail transactions.¹³⁶ All shops in the city of London are market overt, for the purpose of their own trade;¹³⁷ but a sale by sample is not within the custom, because the whole transaction, and not merely the formation of the contract, must

219; *Cundy v. Lindsay*, 3 App. Cas. 459; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739; *Parsons v. Webb*, 8 Greenl. (Me.) 38; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Prime v. Cobb*, 63 Me. 200; *Riford v. Montgomery*, 7 Vt. 418; *Bryant v. Whitchee*, 52 N. H. 158; *Barrett v. Warren*, 3 Hill (N. Y.) 348; *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Scollans v. Rollins*, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284 (full citation of cases). The cases cited under the exceptions may also generally be cited under the rule. *Benj. Sales*, § 6.

¹³⁴ *Stone v. Marsh*, 6 Barn. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 108, 2 Clark & F. 250; *White v. Spettigue*, 13 Mees. & W. 603; *Lee v. Bayes*, 18 C. B. 599; *Hoffman v. Carow*, 20 Wend. (N. Y.) 21; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Riley v. Water-Power Co.*, 11 Cush. (Mass.) 11.

¹³⁵ *Miller v. Race*, 1 Burrows, 452; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739.

¹³⁶ *Benj. Sales*, § 8.

¹³⁷ See *Wilkinson v. Rex*, 2 Camp. 335.

take place within the open market.¹³⁸ Outside the city of London, markets overt may exist by grant or prescription.¹³⁹ The exception in favor of sales in market overt has never existed in the United States.¹⁴⁰

Negotiable Instruments.

Where a negotiable instrument is payable to bearer or indorsed in blank, so as to be transferable by delivery, a bona fide purchaser under the circumstances mentioned in the black-letter text acquires a good title to the instrument, although the seller had not himself a good title.¹⁴¹ Moreover, if a negotiable instrument is duly negotiated to a bona fide purchaser under the same circumstances, he holds the instrument free from most of the defenses available to prior parties between themselves.¹⁴² As has been stated, the transfer of the title to negotiable instruments stands upon a different footing from the transfer of title to goods.¹⁴³

Sale under Power.

The owner may, of course, make a sale by an agent thereto authorized; and he may, as in the case of a mortgage, expressly confer on another the power of making a sale upon a certain contingency. But, besides these cases of sale with the consent of the owner, there are many cases where the authority is implied by law from the relation of the parties, or is conferred by law. Thus a pawnee of goods has authority, in case of default, to sell the goods pledged;¹⁴⁴ and the master of a ship has implied authority, in case of necessity, to sell the goods of the

¹³⁸ *Crane v. London Dock Co.*, 5 Best & S. 313, 33 Law J. Q. B. 224.

¹³⁹ Chalm. Sale of Goods Act (6th Ed.) 60.

¹⁴⁰ *Dame v. Baldwin*, 8 Mass. 518; *Towne v. Collins*, 14 Mass. 500; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Hosack v. Weaver*, 1 Yeates (Tenn.) 478; *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130; *Browning v. Magill*, 2 Har. & J. (Md.) 308; *Roland v. Gundy*, 5 Ohio, 202; *Ventress v. Smith*, 10 Pet. (U. S.) 161, 9 L. Ed. 382; 2 Kent, Comm. 324.

¹⁴¹ *Norton, Bills & Notes* (3d Ed.) 11, 204.

¹⁴² See *Norton, Bills & Notes* (3d Ed.) 216 et seq.

¹⁴³ *Ante*, p. 4.

¹⁴⁴ 2 Kent, Comm. 582; *Schouler, Bailm.* § 227 et seq.; *Tiffany, Ag.* 41; *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525.

shippers of the cargo.¹⁴⁵ So a landlord distraining for rent may sell the goods of his tenant.¹⁴⁶ And a sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution; nor will the title to them be affected if the execution was voidable,¹⁴⁷ though, if the defendant had no title, the sheriff can, of course, give none.¹⁴⁸ It would be useless to multiply illustrations of the cases in which property may be sold, without the consent of the owner, under process of law.

Estoppel.

The English Sale of Goods Act provides: "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."¹⁴⁹ In other words, where the owner by his words or conduct causes another to believe that the goods belong to a third person and to buy them from such third person in that belief, he is estopped to assert his title against such buyer.¹⁵⁰ Mere carelessness, however, on the part of the owner in

¹⁴⁵ 3 Kent, Comm. 173.

¹⁴⁶ Woodf. Landl. & Ten. (18th Ed.) 479-481; Tayl. Landl. & Ten. (8th Ed.) § 57 et seq.

¹⁴⁷ Turner v. Felgate, 1 Lev. 95; Manning's Case, 8 Coke, 94b; Emmett v. Thorn, 1 Maule & S. 425; Bank of U. S. v. Bank, 6 Pet. (U. S.) 9, 8 L. Ed. 299; Park v. Darling, 4 Cush. (Mass.) 197; Jackson v. Cadwell, 1 Cow. (N. Y.) 623; Woodcock v. Bennet, Id. 711, 13 Am. Dec. 568; Stinson v. Ross, 51 Me. 556, 81 Am. Dec. 591. Otherwise where the judgment or execution is void. Lock v. Sellwood, 1 Q. B. 736; Camp v. Wood, 10 Watts (Pa.) 118; Caldwell v. Walters, 18 Pa. 79, 55 Am. Dec. 592; Kennedy v. Duncklee, 1 Gray (Mass.) 65. See Jetton v. Tobey, 62 Ark. 84, 34 S. W. 531.

¹⁴⁸ Farrant v. Thompson, 5 Barn. & Ald. 826; Shearick v. Huber, 6 Bin. (Pa.) 2; Griffith v. Fowler, 18 Vt. 390; Buffum v. Deane, 8 Cush. (Mass.) 41; Champney v. Smith, 15 Gray (Mass.) 512; Williams v. Miller, 16 Conn. 146; Symonds v. Hall, 37 Me. 354, 59 Am. Dec. 53; Coombs v. Gorden, 59 Me. 111; Bryant v. Whitchee, 52 N. H. 158.

¹⁴⁹ Section 21 (1), followed in Sales Act, § 23 (1).

¹⁵⁰ Pickard v. Sears, 6 Adol. & E. 409; Gregg v. Wells, 10 Adol. & E. 90; Freeman v. Cooke, 2 Exch. 654; Knights v. Wiffen, L. R. 5 Q. B. 660. See, also, Henderson & Co. v. Williams (1895) 1 Q. B. 521. Cf. Anderson v. Read, 106 N. Y. 333, 13 N. E. 292; post, p. 31.

guarding his property, is not enough to create an estoppel.¹⁵¹ To create an estoppel, he must by his words or acts, on which the buyer has relied, have misled the buyer.¹⁵²

Same—Sale by Person in Possession of Goods.

At common law a person in possession of goods, although with the consent of the owner, cannot, as a rule, confer on another, either by sale or pledge, any better title to the goods than he himself has.¹⁵³ Authority to sell is not to be inferred from the mere possession of goods.¹⁵⁴ A mere bailee can give no title.¹⁵⁵ Nor, where the question is unaffected by statute, can a buyer in possession under a so-called conditional sale pass title to a bona fide purchaser.¹⁵⁶ Intrusting another with the possession, indeed, if accompanied by other circumstances investing the possession with the appearance of ownership, may estop the owner from denying the ownership of the person whom he has so trusted, as against a buyer from him who has

¹⁵¹ *Knox v. American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Bangor Electric Light & Power Co. v. Robinson (C. C.)* 52 Fed. 520; *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411. Cf. *Scollans v. Rollins*, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284.

¹⁵² *Farquarson v. King* (1902) App. Cas. 325.

¹⁵³ "At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. * * * The general rule was that to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced bona fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited." *Cole v. Bank*, L. R. 10 C. P. 354, at page 362, per Blackburn, J.

¹⁵⁴ *Cole v. Bank*, *supra*; *Johnson v. Credit Lyonnais*, 2 C. P. Div. 224, affirmed 3 C. P. Div. 32; *Saltus v. Everett*, 20 Wend. (N. Y.) 287, 82 Am. Dec. 541; *Covill v. Hill*, 4 Denio (N. Y.) 323.

¹⁵⁵ *Wilkinson v. King*, 2 Camp. 335; *Covill v. Hill*, *supra*; *Leigh v. Railroad Co.*, 58 Ala. 178; *Baker v. Taylor*, 54 Minn. 71, 55 N. W. 823; *Rumpf v. Barto*, 10 Wash. 382, 38 Pac. 1129.

¹⁵⁶ *Post*, p. 135.

relied upon the apparent ownership—as where the owner has invested the person intrusted with possession with the indicia of title.¹⁵⁷ But it is not enough to raise an estoppel that the person to whom the goods are intrusted is a dealer in that class of goods.¹⁵⁸

Same—Sale by Vendor in Possession.

In some jurisdictions, contrary to the general principle that delivery of possession is not essential to the transfer of the property, the rule prevails that delivery is essential to transfer the property as against bona fide purchasers, and that a person who has sold goods, but who continues in possession of them, can transfer the property in the goods to a bona fide purchaser, who obtains possession of the goods, and that the title of such purchaser will prevail against that of the first buyer.¹⁵⁹ In England this rule has been enacted by the Sale of Goods Act.¹⁶⁰ This doctrine is to be distinguished from the doctrine that retention of possession by the seller is fraudulent as against the seller's creditors, and that in such case the sale can be avoided by them.¹⁶¹ Both doctrines will be discussed later.

¹⁵⁷ *Pickering v. Busk*, 15 East, 38 (permitting transfer in books of wharfinger from name of seller to that of broker); *Dyer v. Pearson*, 3 Barn. & C. 38; *Cole v. Bank*, L. R. 10 C. P. 354; *Calais Steamboat Co. v. Van Pelt*, 2 Black (U. S.) 372, 17 L. Ed. 282 (permitting vessel to be enrolled in name of agent); *Nixon v. Brown*, 57 N. H. 34 (permitting agent to retain bill of sale taken in his own name); *McNeill v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341 (delivering to broker certificate of stock indorsed with blank assignment and power of attorney purporting to be executed for consideration). Cf. *Knox v. American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187; *O'Connor's Adm'r v. Clark*, 170 Pa. 318, 32 Atl. 1029, 29 L. R. A. 607.

¹⁵⁸ *Biggs v. Evans* (1894) 1 Q. B. 88; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Gillman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400.

The fact may have weight in connection with other circumstances indicating that the owner conferred actual authority on the person to whom the goods are intrusted. *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502.

¹⁵⁹ *Post*, p. 204.

¹⁶⁰ Section 25 (1), followed in *Sales Act*, § 25. *Post*, p. 206.

¹⁶¹ *Post*, p. 200.

Same—Bill of Lading—Nature of Instrument.

A bill of lading is a writing signed on behalf of the carrier to whom goods are delivered for transportation, acknowledging the receipt of the goods and undertaking to deliver them at the place of destination, subject to such conditions as may be mentioned in the bill of lading.¹⁶² During the transit the bill of lading is the symbol of the property, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the goods, and by such indorsement and delivery the property in the goods passes, at least if such is the intention of the parties.¹⁶³

A bill of lading is not, however, a negotiable instrument, like a bill of exchange.¹⁶⁴ At common law, although the property in the goods can be transferred by the indorsement of the bill of lading, the contract created thereby cannot, and hence the indorsee cannot sue in the contract in his own name,¹⁶⁵ although this right of the indorsee to sue has in many jurisdictions been conferred by statute.¹⁶⁶ As a rule the transferee of the bill of lading obtains no greater rights under the instrument than his transferor possessed. When the property in the goods has been transferred by an indorsement of the bill of lading while the goods are in transit, no one is entitled to receive the goods from the carrier except the holder of the bill of lading, and if the carrier wrongfully delivers the goods he is liable to the holder for their conversion.¹⁶⁷ Some courts hold, however,

¹⁶² See Blackb. Sales, 275.

¹⁶³ See *Sanders v. McLean*, 11 Q. B. Div. 327, per Bowen, L. J.

¹⁶⁴ See *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

¹⁶⁵ *Thompson v. Doming*, 14 Mees. & W. 403.

¹⁶⁶ See St. 18 & 19 Vict. c. 111; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

¹⁶⁷ *Forbes v. Railroad Co.*, 133 Mass. 154; *First Nat. Bank v. Railroad Co.*, 58 N. H. 203; *Union Pac. Ry. Co. v. Johnson*, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540. See, also, *North Pennsylvania R. Co. v. Bank*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287; *Walters v. Railroad, Co (C. C.)* 63 Fed. 391; *Furman v. Railway Co.*, 106 N. Y. 579, 13 N. E. 587; *Wright & Colton Wire-Cloth Co. v. Warren*, 177 Mass. 283, 58 N. E. 1082.

Bills of lading in this country commonly provide that, unless delivery is to be made to the consignee "or order," delivery may be made without presentation of the bill.

When a bill of lading is drawn in a set of three, and two or more

that the liability of the carrier ceases upon delivery of the goods on the order of the consignee, if he is then the rightful owner, notwithstanding that the bill of lading is not surrendered, and, consequently, that one to whom the bill of lading is afterwards transferred for value cannot recover from the carrier for a conversion of the goods.¹⁰⁰ On the other hand, it is held by some courts, with good reason, that it is immaterial that the bills of lading are negotiated after such delivery, at least if the delivery was at an intermediate point, but that the carrier, by permitting the bills to remain outstanding with the appearance of live bills, is estopped as against an innocent purchaser from showing that he delivered the goods to the shipper, and is liable for failure to

parts of the bill are transferred to two or more different bona fide holders for value, the property in the goods passes to the transferee who is first in time. *Barber v. Meyerstein*, L. R. 4 H. L. 317.

But the carrier may safely deliver them to him who first presents one of the parts, provided the carrier acts in good faith and without notice of any prior claim. *Glynn, Mills & Co. v. East & West India Docks*, 7 App. Cas. 591.

A shipper drew against his consignment for sale upon the consignees, with whom his account was already overdrawn, and transferred the property, by assignment of the duplicate bills of lading, to a bank, which discounted the drafts. The consignees refused to accept or to pay the drafts, but afterwards received the property from the carrier upon the original bills of lading. Held, that the consignees had no right to apply the property, or its proceeds, in discharge of the shipper's liability to themselves arising from other transactions, and that the bank had acquired title to each consignment to the extent of the draft discounted on security thereof. *First Nat. Bank v. Ege*, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431.

A holder of a bill of lading who allows another to get possession of it, properly indorsed, upon a delivery by the carrier thereunder to such person is estopped as against the carrier to deny the legality of the delivery. *Douglas v. Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276.

¹⁰⁰ *National Commercial Bank v. Transportation Co.*, 59 App. Div. 270, 69 N. Y. Supp. 396, affirmed 172 N. Y. 596, 64 N. E. 1123; *Mairs v. Railroad Co.*, 73 App. Div. 265, 76 N. Y. Supp. 838.

Delivery of goods by a carrier on order of the consignee, without presentation of the bill of lading, to one who has paid the consignee therefor, vests title in him as against one to whom after such delivery the consignee transfers the bill. *Anchor Mill Co. v. Railroad Co.*, 102 Iowa, 262, 71 N. W. 255.

deliver to the holder of the bill.¹⁶⁹ A thief, or a finder of a bill of lading running to bearer or indorsed in blank, cannot confer title upon an innocent purchaser.¹⁷⁰

In some states statutes have been enacted declaring bills of lading to be negotiable, by indorsement and delivery in the same manner as bills of exchange; but they have generally been strictly construed, and have had little effect in putting bills of lading on the footing of bills of exchange.¹⁷¹ Similar statutes have been passed in many states in respect to warehouse receipts, and they have generally been construed with

¹⁶⁹ *Union Pac. R. Co. v. Johnson*, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; *Ratzer v. Railway Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530. See, also, *Ryan v. Railway Co.*, 90 Minn. 12, 95 N. W. 758.

¹⁷⁰ *Gurney v. Behrend*, 3 El. & Bl. 622; *Brower v. Peabody*, 13 N. Y. 126. Where the issue of a bill of lading is procured by fraud upon the owner, such that the property in the goods does not pass, a bona fide transferee acquires no title. *Dows v. Perrin*, 16 N. Y. 325.

¹⁷¹ *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. See *Greenbaum v. Megibben*, 73 Ky. 419; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; *Commercial Bank v. Hurt*, 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; *Dolliff v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466.

"They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice of nondelivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import." *Shaw v. Railroad Co.*, *supra*. But see *Tiedeman v. Knox*, 53 Md. 612.

like effect.¹⁷² A radical change in the law governing negotiable documents of title is made by the proposed Sales Act, which largely adopts the mercantile view of these instruments and follows the analogy of bills and notes.¹⁷³

Same—Sale by Person in Possession of Bill of Lading.

Whether a person to whom the possession or custody of a negotiable bill of lading has been intrusted by the owner, where the bill has been indorsed to such person, or, if running to bearer or indorsed in blank, has been delivered to him, can confer upon a bona fide purchaser a better title than such person possessed, is a question on which the decisions in this country are not in accord.

In England, it seems that, except for the purposes of the Factors' Act¹⁷⁴ and of defeating the right of stoppage in transitu,¹⁷⁵ he cannot, but that the bill of lading can only be negotiated subject to all the equities attaching to it.¹⁷⁶ There the effect of the indorsement depends upon the particular circumstances of the indorsement, which does not necessarily pass the legal property in the goods.¹⁷⁷ "The possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill

¹⁷² *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Ins. Co. v. Kiger*, 103 U. S. 352, 26 L. Ed. 433; *Security Bank v. Storage Co.*, 55 Minn. 107, 58 N. W. 582; *Commercial Bank v. Hurt*, 99 Ala. 140, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; *Commercial Bank v. Lee*, 99 Ala. 496, 12 South. 572, 19 L. R. A. 705.

Many states have statutes declaring warehouse receipts to be negotiable. See *Price v. Insurance Co.*, 43 Wis. 287, 281; *Greenbaum v. Meglbben*, 10 Bush (Ky.) 419; *Farmer v. Etheridge*, 24 Ky. Law Rep. 649, 69 S. W. 761; *Dolliff v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466; *Lewis v. Bank*, 46 Or. 182, 78 Pac. 990.

Important changes are introduced by the proposed Warehouse Receipts Act, recommended by the Commissioners on Uniform State Laws, and in 1907 enacted in Connecticut, Illinois (with some modifications), Iowa, Massachusetts, New Jersey, and New York; *post*, p. 273.

¹⁷³ Sections 27-40.

¹⁷⁴ *Post*, p. 38.

¹⁷⁵ *Post*, p. 333.

¹⁷⁶ *Chalmers, Sale of Goods Act* (6th Ed.) 166.

¹⁷⁷ *Sewell v. Burdick*, 10 App. Cas. 74.

of lading of goods in transitu had the same effect in defeating the unpaid vendor's right to stop in transitu that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the documents of title by means of which the actual possession of the goods could be obtained had no greater effect at common law than the transfer of the actual possession."¹⁷⁸ It is to be observed, however, that if the holder of the bill of lading has the property in the goods, although he has obtained it by fraud, he has a voidable title, and can give good title by indorsement of the bill of lading to an innocent purchaser before the defrauded owner has disaffirmed.¹⁷⁹

In this country, also, the rule appears to be that the title does not necessarily pass by the indorsement or transfer of a negotiable bill of lading,¹⁸⁰ and in some jurisdictions it is held that evidence is admissible to show that it was the intention to retain title even as against bona fide purchasers.¹⁸¹ On the other hand, decisions are not wanting which adopt the mercantile view, and which hold that a person to whom a bill of lading, negotiable in form, has been indorsed and delivered, or, if running to bearer or indorsed in blank, has been delivered, by or with the consent of the owner of the goods, is so far invested with the appearance of ownership that the owner will be estopped from asserting title as against a bona fide purchaser of the bill of lading to whom such person has duly negotiated it.¹⁸²

¹⁷⁸ *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, per Blackburn, J.

¹⁷⁹ *The Argentina*, 1 Adm. 370.

¹⁸⁰ *Post*, p. 172.

¹⁸¹ See *The Carlos F. Roses*, 177 U. S. 655, 20 Sup. Ct. 803, 44 L. Ed. 929; *Neimeyer Lumber Co. v. Railroad Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *Washburn-Crosby Co. v. Railroad Co.*, 180 Mass. 252, 62 N. E. 590. Cf. *Moors v. Drury*, 186 Mass. 424, 71 N. E. 810; *post*, p. 172.

¹⁸² *Pollard v. Reardon*, 65 Fed. 848, 13 C. C. A. 171; *Munroe v. Warehouse Co. (O. C.)* 75 Fed. 545; *Commercial Bank v. Armsby Co.*, 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443; *Third Nat. Bank v. Smith*, 107 Mo. App. 178, 81 S. W. 215; *National Bank v. Railroad Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. See *Sales Act*, § 33.

Factors' Acts.

At common law, when the principal intrusts goods to a factor for sale, the factor may sell in his own name, and, unless the buyer has notice of some limitation upon the authority, the agent has, as against him, the customary powers of a factor, such as fixing the price and selling on credit.¹⁸³ On the other hand, although the goods are intrusted to the possession of a factor, unless they are intrusted for sale, the factor has no power to sell them, and one who buys in reliance upon his apparent ownership is not protected.¹⁸⁴ Moreover, at common law a factor intrusted with possession has no power to pledge as security for his own debt.¹⁸⁵ To afford protection to persons dealing with factors and other agents intrusted with the possession of goods, or of the documents of title to goods, factors' acts have been enacted in many jurisdictions. Speaking of the latest English Factors' Act (1889), Judge Chalmers says: It "is a partial application to English law of the French maxim, 'En fait de meubles possession vaut titre.' The present act is the result of a long struggle between the mercantile community on the one hand and the principles of common law on the other. The general rule of the common law was, 'Nemo dat quod non habet,' and it was held that the mere possession of goods or documents of title to the goods did not enable him to dispose of those goods in contravention of his instructions with respect to them. The merchants and bankers contended that, in the interest of commerce, if a person was put or left in the possession of goods or documents of title, he ought, as regards innocent third parties, to be treated as the owner of the goods."¹⁸⁶

Same—In England.

The early English Factors' Act of 1825 (St. 6 Geo. IV, c. 94)¹⁸⁷ has been to a great extent the model of the various

¹⁸³ See *Tiffany*, Ag. 222.

¹⁸⁴ *Ante*, p. 31.

¹⁸⁵ *Paterson v. Task*, Strange, 1178; *Warner v. Martin*, 11 How. (U. S.) 209, 13 L. Ed. 667; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573. Or to barter. *Tiffany*, Ag. 223.

¹⁸⁶ Chalmers, *Sale of Goods Act* (6th Ed.) 132.

¹⁸⁷ An earlier act was passed in 1823 (St. 6 Geo. IV, c. 83).

enactments on the same subject in the United States. The second section provided that any person "intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, shall be deemed and taken to be the true owner * * * of the goods * * * mentioned in said several documents * * * so far as to give validity to any contract" made by him with any other person for the sale or disposition of the goods, or for the deposit or pledge thereof as security for advances made upon the faith of such several documents, or either of them; provided, such person had not notice that the person so intrusted was not the actual and bona fide owner of the goods. This made an important alteration in the law, by giving to the possessor of bills of lading or other documents of title power of selling or pledging the goods beyond any which, either by the common law or by any other section of the act, the possession of the goods themselves conferred.¹⁸⁸ It is to be observed that it was only persons who dealt with the person in possession upon the faith of the documents, in the belief that he was owner, who were protected.¹⁸⁹ The fourth section provided that purchasers from any agent "intrusted with any goods, wares and merchandise," or to whom the same might be consigned, should be protected in their purchases, notwithstanding notice that the seller was agent, provided that the purchase and payment were made in the usual course of business, and the buyer had not notice of the absence of authority of the agent. By St. 5 & 6 Vict. c. 39 (1842), the act was so amended as to give the same effect to the possession of the goods as to that of documents of title, and it was provided that any agent intrusted with the possession of either was to be deemed the true owner, so as to give validity to any bona fide contract by way of pledge, with the important change that such contract should be binding upon the owner, notwithstanding that the pledgee had notice that the person with whom the agreement was made was only an agent. These acts applied solely to persons intrusted as factors or com-

¹⁸⁸ Evans, Ag. 416.

¹⁸⁹ Phillips v. Huth, 6 Mees. & W. 572; Hatfield v. Phillips, 9 Mees. & W. 647.

mission merchants, and not to persons to whose employment authority to sell is not ordinarily incident; for example, a wharfinger.¹⁹⁰ They were limited in their scope to mercantile transactions, and did not embrace sales of furniture or of goods in possession of a tenant or bailee for hire.¹⁹¹

It might be supposed that the effect of these enactments would be such that, if the owner of goods intrusted their possession or the documents of title to a person who from the nature of his employment might be taken *prima facie* to have the right to sell, a pledge by such a person to one who was without notice of the absence of authority would bind the true owner. Nevertheless, under St. 5 & 6 Vict. c. 39, it was held that the agent must be actually intrusted at the time of the pledge, and that if the authority had been withdrawn, although the pledgee was ignorant thereof and acted in good faith, and the agent remained in possession, the pledgee was not protected.¹⁹² To constitute a person "an agent intrusted with the possession," he must have been intrusted in the character of such agent; that is, for the purpose of sale.¹⁹³ The acts did not cover the case of a seller left in possession,¹⁹⁴ or of a buyer left in possession,¹⁹⁵ so as to defeat the rights of an unpaid seller.

In 1877 by St. 40 & 41 Vict. c. 39, the law was amended by providing that a secret revocation of agency should not be operative, and the scope of the earlier acts was extended, so as to provide in effect that a seller left in possession of the documents of title, or a buyer obtaining possession of such documents without title, could make a valid sale or pledge to one taking without notice of the prior sale, or of the original

¹⁹⁰ *Monk v. Whittenbury*, 2 Barn. & Adol. 484; *Wood v. Rowcliffe*, 6 Hare, 183; *Lamb v. Attenborough*, 1 Best & S. 831; *Jaullery v. Britten*, 4 Bing. N. C. 242; *Hellings v. Russell*, 33 L. T. (N. S.) 380.

¹⁹¹ *Loeschman v. Machin*, 2 Starkie, 311; *Cooper v. Willomatt*, 1 C. B. 672.

¹⁹² *Fuentes v. Montis*, L. R. 4 C. P. 93. See, also, *Sheppard v. Union Bank*, 7 Hurl. & N. 601.

¹⁹³ *Cole v. Northwestern Bank*, L. R. 9 C. P. 470, affirmed L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais Co.*, 2 C. P. Div. 224, affirmed 3 C. P. Div. 32; *Biggs v. Evans* (1894) 1 Q. B. 88.

¹⁹⁴ *Johnson v. Credit Lyonnais Co.*, 2 C. P. Div. 224.

¹⁹⁵ *Jenkyns v. Osborne*, 7 Man. & G. 678; *McEwan v. Smith*, 2 H. L. Cas. 309.

seller's rights, as the case might be. In 1889 was passed an act to amend and consolidate the factors' acts (St. 52 & 53 Vict. c. 45), which embodied the changes made by the act of 1877, and made valid sales and pledges by sellers and buyers in possession, as well of the goods, as of the documents of title.¹⁹⁶

It is to be observed that the latter changes, by extending the operation of the acts to sellers and buyers in possession, includes a new class of persons, not embraced in the earlier acts; the earlier acts being confined to factors.¹⁹⁷

Same—In the United States.

Factors' acts have been passed in many states.¹⁹⁸ Owing to their varying provisions, only that of New York, which has been followed in some other states, will be considered. This act was passed in 1830, and was, with some modifications, based on St. 6 Geo. IV, c. 94.¹⁹⁹ It provides in section 3 that "every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of any such merchandise,²⁰⁰ and every such

¹⁹⁶ Reproduced, with modification, in Sale of Goods Act, § 25. See *Lee v. Butler* (1893), 2 Q. B. 318 (cf. *Helby v. Matthews* [1895] App. Cas. 471); *Cahn v. Pockett's, etc., Co.* (1899) 1 Q. B. 643.

¹⁹⁷ Sale of Goods Act, § 25 (1), is followed by the proposed American Sales Act, § 25. Post, p. 203. But section 25 (2) of the English Act, providing that the buyer in possession can transfer title, is omitted.

¹⁹⁸ Kentucky, Act May 5, 1880, Laws 1880, p. 200, c. 1541. Maine Rev. St. c. 31. Maryland, Code Pub. Gen. Laws 1888, art. 2. Massachusetts, Rev. Laws 1902, c. 68 (construing the Massachusetts act), *Nickerson v. Darrow*, 5 Allen (Mass.) 419; *Stollenwerck v. Thacher*, 115 Mass. 224; *Thacher v. Moors*, 134 Mass. 156; *Goodwin v. Trust Co.*, 152 Mass. 189, 25 N. E. 100; *Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279; *Calrns v. Page*, 165 Mass. 552, 43 N. E. 503. New York, Rev. St. (9th Ed.) p. 2006. Ohio Rev. St. 1890, §§ 3214-3220. Pennsylvania, P. & L. Dig. pp. 2027-2029. Rhode Island, Gen. Laws 1896, c. 158. Wisconsin, St. 1898, §§ 3345, 3346.

¹⁹⁹ See *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Id.*, 3 Denio (N. Y.) 472; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573.

²⁰⁰ Referring to section 1: "Every person in whose name any merchandise shall be shipped"; i. e., any merchandise shipped in the name of the factor or agent. *Cartwright v. Wilmerding*, 24 N. Y. 521, 527; *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *First Nat. Bank v. Shaw*, 61 N. Y. 283.

factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent, with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing, given by such other person upon the faith thereof." The words "upon the faith thereof" are to be referred to the words "shall be deemed to be the true owner thereof." In other words, the statute does not afford protection to one who knows that he is not dealing with the true owner.²⁰¹ "The object of the statute was to protect innocent persons who deal in reliance upon apparent ownership, resting upon possession either of the merchandise itself or documentary evidence of ownership."²⁰² The act thus differs materially from the later English acts, in which the protection extends to those dealing with the agent, notwithstanding knowledge that he is such, provided they are without notice that he is exceeding his authority.²⁰³

The protection of the act is extended to persons dealing with (1) a factor or other agent intrusted with the bill of lading or other document, or (2) a factor or other agent who is intrusted with the possession of the merchandise "for the purpose of sale or as security for any advances to be made or obtained thereon." Under the first branch the agent must have the documentary evidence of title in his name.²⁰⁴ This must be a bill of

²⁰¹ *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Covell v. Hill*, 6 N. Y. 374; *Howland v. Woodruff*, 60 N. Y. 73.

This construction was disapproved under a similar act in Wisconsin, *Price v. Insurance Co.*, 43 Wis. 267. Cf. *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573.

²⁰² Per Vann, J., in *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595.

²⁰³ *Navulshaw v. Brownrigg*, 1 Sim. (N. S.) 573; *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113. See *Factors' Act 1889* (St. 52 & 53 Vict. c. 45) § 2.

²⁰⁴ *First Nat. Bank v. Shaw*, 61 N. Y. 233.

It seems that the document must be intrusted "for the purpose of sale," etc. *Cartwright v. Wilmerding*, 24 N. Y. 521, 523. Cf. *Price v. Insurance Co.*, 43 Wis. 267.

lading, custom-house permit, or warehouse keeper's receipt; ²⁰⁵ the act thus differing from the later English acts, which have included any document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize the possessor to transfer or receive goods thereby represented.²⁰⁶ Under the second branch the intrusting must be for the purpose of sale or obtaining advances,²⁰⁷ here again differing from the present English act.²⁰⁸ The possession must be actual, and not merely constructive.²⁰⁹ In either case, the possession must be "intrusted." The agent must be consciously and voluntarily intrusted, and the act has no application to a case where the documents or the goods are taken by trespass or theft, and thus the possession is from the beginning wrongful.²¹⁰

Sale under Voidable Title.

"Where goods have been obtained by means amounting to larceny, the thief has no title, and can give none; * * * but, where goods have been obtained by fraud, the person

²⁰⁵ *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843. Cf. *Cartwright v. Willmerding*, 24 N. Y. 521.

²⁰⁶ *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113. See *Factors' Act* 1889 (St. 52-53 Vict. c. 45) § 1,

²⁰⁷ *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818.

²⁰⁸ See *Factors' Act* 1889, § 2.

One employed on a salary to go about and sell goods put into his manual possession is a person "intrusted with merchandise and having authority to sell or consign the same," within Pub. St. Mass. 1882, c. 71, § 3, protecting one who receives merchandise from such person, and advances money thereon in good faith, believing him to be the owner; the statute not being confined to mercantile agents. *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503.

Cf. *Hastings v. Pearson* (1892) 1 Q. B. 62.

²⁰⁹ *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Howland v. Woodruff*, 60 N. Y. 73.

²¹⁰ *Kinsey v. Leggett*, 71 N. Y. 387; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; *Sage v. Lumber Co.*, 4 App. Div. 290, 39 N. Y. Supp. 449, affirmed 158 N. Y. 672, 52 N. E. 1126. See, also, *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Collins v. Ralli*, 20 Hun (N. Y.) 246, affirmed 85 N. Y. 637. See, also, *Commercial Bank v. Hurt*, 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; *Commercial Bank v. Lee*, 99 Ala. 493, 12 South. 572, 19 L. R. A. 705.

who so obtains them may have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud be such that there was never a contract between the parties, as, for instance, if A. obtains goods from B. by falsely pretending to be X., then the person who so obtains the goods has no title at all and can give none.²¹¹ But if the person defrauded really intended to part with the property in, and possession of, the goods, though induced to do so by fraud, there is a contract which he may affirm or disaffirm at his election."²¹² Hence the person who obtains the goods has a voidable title, and can give a good title to an innocent purchaser before the other party has disaffirmed.²¹³ And the same rule prevails where the sale is voidable in favor of creditors.²¹⁴

SUBJECT-MATTER OF SALE.

11½. EXISTENCE AND OWNERSHIP. The goods which form the subject-matter of a sale must be in existence and owned by the seller.

12. SALE OF FUTURE GOODS. Where the parties purport to effect a present sale of future goods—that is, of goods to be manufactured or acquired by the seller after the making of the contract of sale—the agreement operates only as a contract to sell the goods.

EXCEPTIONS—(a) According to the rule generally prevailing in this country a contract to sell goods which have a potential existence—that is, which are the expected product or increase of something owned by the seller—operates to pass the property in the goods upon their coming into existence.

(b) A contract to sell goods not yet acquired by the seller operates, according to some authorities, to give the

²¹¹ *Higsons v. Burton*, 26 Law J. Exch. 342; *Hardman v. Booth*, 32 Law J. Exch. 105; *Cundy v. Lindsay*, 3 App. Cas. 459; post, p. 196.

²¹² *Chalm. Sale of Goods Act* (6th Ed.) 61. See *Clough v. London & N. W. Ry. Co.* L. R. 7 Exch. 26; post, p. 188.

²¹³ *White v. Garden*, 10 C. B. 919, 20 Law J. C. P. 166; *Kingsford v. Merry*, 25 Law J. Exch. 166; *Zoeller v. Riley*, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157; post, p. 193.

See *Sales Act*, § 24; *Sale of Goods Act*, § 23.

²¹⁴ *Sleeper v. Chapman*, 121 Mass. 404; post, p. 203.

buyer an equitable lien or interest in the goods upon their acquisition by the seller; but the doctrine is doubtful.

- 13. CONTRACT TO SELL.** Goods not yet in existence or acquired by the seller, or the acquisition of which is dependent upon a contingency which may or may not happen, may be the subject of a contract to sell.

Sale of Goods Which have Ceased to Exist.

From the very definition of a sale, it follows that there can be no sale without the existence of the thing sold.²¹⁵ Accordingly, if there is an agreement for the present sale of specific goods, and the goods, unknown to the seller, have ceased to exist at the time of the agreement, the agreement is void.²¹⁶ Thus in the leading case of *Hastie v. Couturier*,²¹⁷ where a bought note had been signed for a cargo of corn on a vessel not yet arrived, but before the sale, and unknown to the parties, the cargo had been discharged and sold at an intermediate port, it

²¹⁵ *Hastie v. Couturier*, 9 Exch. 102, 5 H. L. Cas. 673, reversing 8 Exch. 40; *Strickland v. Turner*, 7 Exch. 208; *Allen v. Hammond*, 11 Pet. (U. S.) 63, 9 L. Ed. 633; *Thompson v. Gould*, 20 Pick. (Mass.) 134; per *Wilde, J.*, 139; *Rice v. Manufacturing Co.*, 2 Cush. (Mass.) 80, 86; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Gibson v. Pelkle*, 37 Mich. 380. See *Clark, Cont.* (2d Ed.) 201. Partial loss does not avoid the contract. The question is whether the article has been so far destroyed as no longer to answer the description. *Barr v. Gibson*, 3 Mees. & W. 300.

Where the parties purport to sell goods which they know to have been destroyed, the agreement is void. *Wolf v. Di Lorenzo*, 22 Misc. Rep. 323, 49 N. Y. Supp. 191.

²¹⁶ *Hamilton v. Park & McKay Co.*, 125 Mich. 72, 83 N. W. 1018. See *Sales Act*, § 7 (1), following *Sale of Goods Act*, § 6. *Sales Act*, § 7 (2), provides that in case of partial destruction, or of such deterioration in quality as substantially to change the character of the goods, the buyer may treat the sale (a) as avoided, or (b) as transferring the property in the existing goods, or in such as have not deteriorated, and as binding him to pay the full agreed price if the sale was indivisible, or the agreed price for the goods in which the property passes if the sale was divisible. Prof. Williston, in his notes to the draft of the act, says that this is believed to express the existing law. The English act contains no such provision, and Judge Chalmers intimates that such is not the English law. *Chalmers, Sale of Goods Act* (6th Ed.) p. 21.

²¹⁷ 9 Exch. 102, 5 H. L. Cas. 673.

was held in the house of lords that what the parties contemplated was that there was an existing something to be sold and bought, and that, no such thing existing, there was no contract which could be enforced. The rule may be based either on the ground of mutual mistake or on the ground of impossibility of performance.²¹⁸ And upon the latter ground, when there is a contract to sell specific goods, and, without the fault of buyer or seller, the goods perish before the property has passed, the contract is avoided.²¹⁹

Sale of Goods Not Owned by Seller.

The necessity of ownership by the seller of the goods sold has already been considered.²²⁰ It is to be observed that there may be a sale of an undivided share of goods; the buyer by force of the agreement becoming an owner in common with the owners of the remaining shares.²²¹ And there may be a sale by one part owner to another.²²²

Sale of Goods Not Yet in Existence or Acquired.

A contract for the sale of goods not yet in existence or acquired by the seller can obviously have no greater effect, as a present sale, than a contract for the sale of goods that have ceased to exist. Nor can a contract purporting to effect a present sale of goods to be acquired operate so as to pass the property in the goods upon their acquisition by the seller, or have any greater force than a contract to sell.²²³ In such case, there-

²¹⁸ Pol. Cont. (4th Ed.) 370. Cf. *Farrer v. Nightingal*, 2 Esp. 639.

²¹⁹ Post, p. 309.

²²⁰ Ante, p. 26.

²²¹ Post, p. 147. See Sales Act, § 6. And see *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415.

²²² See Sales Act, § 1.

²²³ *Lunn v. Thornton*, 1 C. B. 379, 14 Law J. C. P. 161; *Gale v. Burnell*, 7 Q. B. 850; *Congreve v. Evetts*, 10 Exch. 298, 23 Law J. Exch. 273; *Hope v. Hayley*, 5 El. & Bl. 830, 25 Law J. Q. B. 155; *Childell v. Galsworthy*, 6 C. B. (N. S.) 471; *Allatt v. Carr*, 27 Law J. Exch. 385; *Jones v. Richardson*, 10 Metc. (Mass.) 481; *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; *Rice v. Stone*, 1 Allen (Mass.) 566; *Head v. Goodwin*, 37 Me. 182; *Emerson v. Railway Co.*, 67 Me. 387, 24 Am. Rep. 39; *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518; *Gardner v. McEwen*, 19 N. Y. 123; *Cressey v. Sabre*, 17 Hun (N. Y.) 120; *Hamilton v. Rogers*, 8 Md. 301; *Glittings v. Nelson*, 86 Ill. 591; *Hunter v. Bosworth*, 43 Wis. 583. See Sales Act, § 5 (3).

fore, though the contract be in the form of a present sale, the property in the goods does not pass to the buyer unless the seller, after his acquisition of the goods, and before the rights of third persons, such as bona fide purchasers or attaching creditors, have intervened, does some act clearly showing his intention of giving effect to the original agreement and thereby appropriating them to the contract,²²⁴ or the buyer takes possession of them under authority to seize, which is equivalent to a delivery.²²⁵

Potential Existence.

If, however, the goods have a "potential existence," as defined in the first exception, the property in them passes upon their coming into actual existence. In this way a man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows may yield the coming month, but not the wool of any sheep, or the milk of any cows, that he may buy within the year. The doctrine, which was declared in the early case of *Grantham v. Hawley*,²²⁶ is doubted by Judge Chalmers, who justly says that there is no rational distinction between one class of future goods and another.²²⁷ *Grantham v. Hawley* was followed in England in 1846,²²⁸ but the distinction was apparently discarded by the Sale of Goods Act.²²⁹ In this country the doc-

²²⁴ *Langton v. Higgins*, 28 Law J. Exch. 252. Cf. *Dexter v. Curtis*, 91 Me. 505, 40 Atl. 549.

²²⁵ *Congreve v. Evetts*, 10 Exch. 298, 23 Law J. Exch. 273; *Hope v. Hayley*, 5 El. & Bl. 830, 25 Law J. Q. B. 155; *Childell v. Galsworthy*, 6 C. B. (N. S.) 471; *Allatt v. Carr*, 27 Law J. Exch. 385; *Rowan v. Manufacturing Co.*, 29 Conn. 283; *Rowley v. Rice*, 11 Metc. (Mass.) 333; *Chase v. Denny*, 130 Mass. 568; *Cook v. Corthell*, 11 R. I. 482, 23 Am. Rep. 518; *Chapman v. Welmer*, 4 Ohio St. 481; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644. See, also, cases cited in preceding note. Contra: *Allen v. Goodnow*, 71 Me. 420; *Deering v. Cobb*, 74 Me. 334, 43 Am. Rep. 596. As to the revocability of the license to seize: *Chynoweth v. Tenney*, 10 Wla. 397; *McCaffrey v. Woodin*, *supra*; *Jones, Chat. Mortg.* (3d Ed.) § 165 et seq.

²²⁶ *Hob. 132*. See, also, *Robinson v. MacDonnell*, 5 Maule & S. 228; 14 Vin. Abr. tit. "Grant," p. 50; *Shep. Touch. "Grant,"* 241; *Perk. § 65, 90*. See, also, *Foster's Case*, 1 Leon. 42.

²²⁷ *Chalm. Sale of Goods Act* (6th Ed.) 20.

²²⁸ *Petch v. Tutin*, 15 Mees. & W. 110.

²²⁹ Section 5 (3). Sales Act, § 5 (3), follows the English act.

trine has been very generally recognized. Thus it has been held that a man may sell the crops to be sown on his land,²²⁰ or the future offspring of his animals,²²¹ or cheese to be made from the milk of his cows.²²² The cases as a rule are those involving chattel mortgages.²²³ Some cases confine the doctrine to the spontaneous product or increase of that which is already in existence,²²⁴ and many courts refuse to apply it to crops not yet sown.²²⁵

Rule in Equity.

In equity, which treats as done what ought to be done, an agreement for value purporting to mortgage personal property afterwards to be acquired, provided it is sufficiently described to be identified, gives the mortgagee a lien upon the property as soon as it is acquired.²²⁶ But it is only an equitable lien,

²²⁰ *Senter v. Mitchell* (C. C.) 16 Fed. 206; *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449 (peaches to be grown on seller's trees); *Hall v. Glass*, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77.

²²¹ *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262 (during gestation). Contra: *Battle Creek Valley Bank v. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124. And see *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249.

²²² *Conderman v. Smith*, 41 Barb. (N. Y.) 404; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9.

²²³ The rule is affected in many states by the laws governing recording and delivery. Post, p. 137.

²²⁴ A valid mortgage cannot be given on bricks to be made from clay in the seller's land. *T. B. Townsend Brick & C. Co. v. Allen*, 62 Kan. 311, 62 Pac. 1008, 52 L. R. A. 323, 84 Am. St. Rep. 388; See, also, *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635.

²²⁵ *Hutchinson v. Ford*, 9 Bush (Ky.) 318, 15 Am. Rep. 711; *Comstock v. Scales*, 7 Wis. 159. Contra: *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389; *Merchants' & Mechanics' Sav. Bank v. Holdredge*, 84 Wis. 601, 55 N. W. 108. See also *T. B. Townsend Brick & Contracting Co. v. Allen*, 62 Kan. 311, 62 Pac. 1008, 52 L. R. A. 323, 84 Am. St. Rep. 388.

²²⁶ *Holroyd v. Marshall*, 10 H. L. Cas. 191, 33 Law J. Ch. 193; *Tailby v. Official Receiver*, 13 App. Cas. 623; *Collyer v. Isaacs*, 19 Ch. Div. 342; *Mitchell v. Winslow*, 2 Story (U. S.) 630, Fed. Cas. No. 9,673; *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. Ed. 436; *Beall v. White*, 94 U. S. 382, 24 L. Ed. 173; *Brett v. Carter*, 2 Low. (U. S.)

and will not prevail against a purchaser for value without notice.²³⁷ For the same reasons it is generally assumed that in equity a contract for the sale of personal property afterwards to be acquired, if sufficiently identified, operates to give to the buyer an equitable lien or interest in it as soon as it is acquired.²³⁸ The cases cited generally relate to chattel mortgages, and their applicability to contracts of sale is doubtful.²³⁹

Wagering Contract—Sale of Chance.

It was once held that a contract for the sale of goods to be delivered at a future day, when the seller had not the goods, but intended to go into the market and buy them, was a mere wager on the price of the commodity, and was hence invalid.²⁴⁰ But this doctrine has been exploded.²⁴¹ "The goods which

458, Fed. Cas. No. 1,844; *Barnard v. Railroad Co.*, 4 Cliff. (U. S.) 351, Fed. Cas. No. 1,007; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Benjamin v. Railroad Co.*, 49 Barb. (N. Y.) 441; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. 366, 3 Am. Rep. 506; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Williams v. Winsor*, 12 R. I. 9; *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Sillers v. Lester*, 48 Miss. 513; *Ludlum v. Rothschild*, 41 Minn. 218, 43 N. W. 137; *Central Trust Co. v. Improvement Co.*, 169 N. Y. 314, 62 N. E. 387. In Massachusetts the rule appears to be the same in equity as at law. *Moody v. Wright*, 13 Metc. (Mass.) 17, 30, 46 Am. Dec. 706; *Blanchard v. Cooke*, 144 Mass. 225, 11 N. E. 83; *Tatman v. Humphrey*, 184 Mass. 361, 68 N. E. 844, 63 L. R. A. 738, 100 Am. St. Rep. 562. So, also, in Wisconsin, *Hunter v. Bosworth*, 43 Wis. 583; *Merchants' & Mechanics' Sav. Bank v. Holdredge*, 84 Wis. 601, 55 N. W. 108. Cf. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 303, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. See "Transfers of After-Acquired Property," by Samuel Williston, 19 Harv. Law Rep. 567; Williston, *Cas. Sales*, p. 23, note 1.

²³⁷ *Joseph v. Lyons*, 15 Q. B. Div. 280, 54 Law J. Q. B. 3; *Hallas v. Robinson*, 15 Q. B. Div. 288; *Morrill v. Noyes*, 56 Me. 458, 466, 96 Am. Dec. 486.

²³⁸ *Benj. Sales*, § 81. See *Scammon v. Bowers*, 1 Hask. (U. S.) 496, Fed. Cas. No. 12,431; *Hamilton v. Bank*, 3 Dill. (U. S.) 290, Fed. Cas. No. 5,987; *Post v. Corbin*, 5 Nat. Bankr. Rep. (U. S.) 11, Fed. Cas. No. 11,290.

²³⁹ 19 Harv. Law Rep. 584-595.

²⁴⁰ *Bryan v. Lewis*, *Ryan & M.* 386.

²⁴¹ *Hibblewhite v. McMorine*, 5 Mees. & W. 462; *Mortimer v. McCallan*, 6 Mees. & W. 53; *Ajello v. Worsley* (1898) 1 Ch. 274; *Appleman v. Fisher*, 34 Md. 531; *Stanton v. Small*, 3 Sandf. (N. Y.) 230;

form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell."²⁴² Nor is a contract to sell goods invalid because the acquisition of the goods by the seller depends upon a contingency which may or may not happen,²⁴³ as in the case of goods to arrive by a certain ship.²⁴⁴ It is only in this sense that there can be the sale of a chance, known to the civil law as "*venditio spei*."²⁴⁵ Thus it has been held that a sale of fish to be caught had no effect to pass the property in the fish when caught,²⁴⁶ but there seems no reason why a contract by a fisherman to sell all the fish he might catch on a particular voyage should not be good as an executory agreement.

MUTUAL ASSENT AND FORM OF CONTRACT.

14. The transfer of the property is effected by the mutual assent of the parties to the contract of sale.
15. At common law a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.²⁴⁷

Clarke v. Foss, 7 Biss. (U. S.) 541, Fed. Cas. No. 2,852; Wamsley v. H. L. Horton & Co., 77 Hun (N. Y.) 317, 28 N. Y. Supp. 423; Fletcher v. Packing Co., 41 App. Div. 30, 58 N. Y. Supp. 612; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Northington-Munger-Pratt Co. v. Warehouse Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210; post, p. 218.

²⁴² Sales Act, § 5 (1).

²⁴³ Taft v. Church, 162 Mass. 527, 39 N. E. 233. See Sales Act, § 5 (2).

²⁴⁴ Hale v. Rawson, 27 Law J. Q. P. 189; Whitehead v. Root, 2 Metc. (Ky.) 584; post, p. 235.

²⁴⁵ Poth. Cont. de Vente, No. 61. See Buddle v. Green, 27 Law J. Exch. 33, 34, per Martin, B.; Hitchcock v. Giddings, 4 Price, 135, 140, per Richards, C. B.; Hanks v. Palling, 6 El. & Bl. 659, 669, 25 Law J. Q. B. 375, per Lord Campbell, C. J. Cf. Losecco v. Gregory, 108 La. 648, 32 South. 985.

²⁴⁶ Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357.

²⁴⁷ Sales Act, § 3.

Mutual Assent.

If there be parties capable of contracting, and a thing in existence and owned by one of them, the property in the thing may be transferred whenever the parties mutually assent to the transfer. Neither delivery of the thing nor payment of the price is necessary to perfect the transfer.²⁴⁸ The parties may make whatever bargain they please. They may agree that the transfer shall take effect at once, or they may agree that it shall not take effect until after delivery or payment, or the happening of some other condition; and if they express their intentions clearly, the law will give effect to them.

The contract of sale, like other contracts, is founded on mutual assent. The principles of law which govern the formation of the contract are the same as those which govern the formation of contracts generally, and little need be said in regard to them. Thus an offer to buy or to sell, in order to ripen into a binding agreement, must be accepted, and the acceptance must be unconditional;²⁴⁹ and until acceptance, but not after, the offer may be withdrawn.²⁵⁰

²⁴⁸ Benj. Sales, § 8; post, p. 121.

²⁴⁹ *Hutchison v. Bowker*, 5 Mees. & W. 535; *Hyde v. Wrench*, 8 Beav. 334; *Jordan v. Norton*, 4 Mees. & W. 155; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, 31 Law J. C. P. 204; *Minneapolis & St. L. Ry. Co. v. Mill Co.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Carr v. Duvall*, 14 Pet. (U. S.) 77, 10 L. Ed. 361; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80; *Smith v. Gowdy*, 8 Allen (Mass.) 566; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *MacLay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Maynard v. Tabor*, 53 Me. 511; *McIntosh v. Brill*, 20 U. C. C. P. 426. See Clark, *Cont.* (2d Ed.) 21-31.

²⁵⁰ *Cooke v. Oxley*, 3 Term R. 653; *Routledge v. Grant*, 4 Bing. 653; *Paine v. Cave*, 3 Term R. 148; *Head v. Diggon*, 3 Man. & R. 97; *Smith v. Hudson*, 6 Best & S. 431, 34 Law J. Q. B. 145; *Dickinson v. Dodds*, 2 Ch. Div. 463; *Byrne v. Van Tienhoven*, 5 C. P. Div. 344; *Stevenson v. McLean*, 5 Q. B. Div. 340; *Craig v. Harper*, 3 Cush. (Mass.) 158; *Boston & M. R. Co. v. Bartlett*, Id. 224; *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335; *Johnston v. Fessler*, 7 Watts (Pa.) 48, 32 Am. Dec. 738; *Grotenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *Tucker v. Woods*, 12 Johns (N. Y.) 190, 7 Am. Dec. 305; *Faulkner v. Hebard*, 26 Vt. 452; *Falls v. Galther*, 9 Port. (Ala.) 606; *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; *Larmon v. Jordan*, 56 Ill. 204; *Johnson v. Filkington*, 89 Wis. 62;

Mistake Affecting Mutual Assent.

From the principle that contracts can be effected only by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no valid agreement, notwithstanding the apparent mutual assent.²⁵¹

Same—Mistake as to Parties.

Such a mistake may arise as to the identity of the person with whom the contract is made. Where A. intends to contract with B., and addresses an offer to him, C. cannot substitute himself as a party by accepting the offer; and in such case, if A. thinks the acceptance is by B., there is no contract. For example, if a buyer sends an order for goods to a firm, and the order is filled by a different firm, which has succeeded the firm to which the order was sent, and the buyer supposes it to have been filled by the firm to whom he gave the order, there is no contract.²⁵² In such a case the seller could recover the goods from the supposed buyer, if he refused to pay for them, provided they were unconsumed, but he could not recover the price. So, if a person obtains goods from another by falsely representing that he is the agent of a third person, to whom the owner supposes he is selling, there is no sale.²⁵³

Clark, Cont. (2d Ed.) 31. As to contracts by letter, see Benj. Sales, § 44 et seq; Pol. Cont. (4th Ed.) 31 et seq; Clark, Cont. (2d Ed.) 25; Langd. Cas. Cont. 993; "Contract by Letter," by Prof. Langdell, 7 Am. Law Rev. 432.

²⁵¹ Benj. Sales, § 50; Utley v. Donaldson, 94 U. S. 29, 47, 24 L. Ed. 54. See Clark, Cont. (2d Ed.) 206.

²⁵² Boulton v. Jones, 2 Hurl. & N. 564, 27 Law J. Exch. 117. And see Boston Ice Co. v. Potter, 123 Mass. 23, 25 Am. Rep. 9; Randolph Iron Co. v. Elliott, 84 N. J. Law, 184; Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367; Consumers' Ice Co. v. Webster, Son & Co., 32 App. Div. 592, 53 N. Y. Supp. 56; Barcus v. Dorries, 71 N. Y. Supp. 695; Clark, Cont. (2d Ed.) 199. Where goods were ordered by Arthur B. Alexander in the name of "A. Alexander," and the seller shipped them to "A. Alexander," supposing they were ordered by Alfred Alexander, who was a man of means, whereas Arthur was notoriously insolvent, no title passed to the latter. Newberry v. Norfolk & S. R. Co., 133 N. C. 45, 45 S. E. 356. Cf. Preston v. Foellinger (C. C.) 24 Fed. 680. As to fraudulent impersonation, post, p. 196.

²⁵³ Higgins v. Burton, 26 L. J. Ex. 342; Hardman v. Booth, 1 Hurl. & C. 803; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Edmunds v. Merchants' Dispatch Transportation Co., 135 Mass. 283; McCrillis

Same—Mistake as to Thing Sold.

Mistake may arise as to the identity or existence of the thing sold.

When a person has entered into a contract, the nature of which he understands, he will not generally be heard to say that his meaning was not expressed in his words, and that he intended to contract for something different from that which his words naturally indicate.²⁵⁴ But an agreement may be void for mistake when two things have the same names, and the parties, owing to the identity of names, mean different things; ²⁵⁵ for example, where the buyer agreed to buy a cargo "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one, and the seller the other.²⁵⁶ Or the seller, having goods of two sorts, may undertake to sell goods of one sort which he mistakenly supposes are contained in a particular package; and if, under this common mistake, the parties agree to buy and sell the goods in that package, there is no contract.²⁵⁷ Or the mistake may arise by the fault of a broker who makes the sale, and describes a different article to each party.²⁵⁸

As we have seen, if, unknown to the seller, the subject of sale is not in existence there is no contract.²⁵⁹

v. Allen, 57 Vt. 505; *Barker v. Dinsmore*, 72 Pa. 427, 13 Am. Rep. 697; *Hentz v. Miller*, 94 N. Y. 67; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *Peters Box & Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367. Where the plaintiffs consigned wool to a broker to whom they would not sell, on the understanding that it was sold to an undisclosed principal in good credit with the plaintiffs, there was no sale to the broker, and he had no power to convey a good title to a bona fide purchaser. *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; post, p. 196.

²⁵⁴ *Benj. Sales*, § 417; *Clark*, Cont. (2d Ed.) 196, 200.

²⁵⁵ *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 33 Law J. Exch. 100; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560.

²⁵⁶ *Raffles v. Wichelhaus*, cited in preceding note.

²⁵⁷ *Harvey v. Harris*, 112 Mass. 32. See, also, *Sheldon v. Capron*, 8 R. I. 171; post, p. 58.

²⁵⁸ *Thornton v. Kempster*, 5 Taunt. 786.

²⁵⁹ Ante, p. 45. Mistake as to the situation of the goods may avoid the contract. *Ketchum v. Catlin*, 21 Vt. 191.

Same—Mistake as to Price.

If the parties are not agreed as to the price, there is, of course, no contract. Consequently, if the seller states the price, and the buyer understands him to name a different price, and accepts the offer upon such misunderstanding, there is no contract.²⁶⁰ So, where the price named by the seller for shingles was \$3.25, which the seller meant to be the price per bunch, and the buyer understood to be the price per thousand, there was no agreement.²⁶¹ A mistake in fixing the terms, not induced by the conduct of the other party, has, as a rule, no effect upon the contract.²⁶² But if the mistake is known to the other, or if he has reason to know it, the contract is voidable.²⁶³

Same—Mistake must Go to the Root of the Contract.

Mistake, however, to have the effect of invalidating the contract, must go to the root of the contract, and must be such as to negative the idea that the parties were ever *ad idem*; ²⁶⁴ for, if the buyer purchases the very article at the very price and on the very terms intended by him and by the seller, the sale is completed by mutual assent, even if it may be liable to be avoided for fraud, illegality, or some other cause,²⁶⁵ or even though the buyer or the seller may be totally mistaken in the motive which induces the assent,²⁶⁶ or even though the thing

²⁶⁰ *Phillips v. Bistolli*, 2 Barn. & C. 511; *Rupley v. Daggett*, 74 Ill. 351; *Rovegno v. Defferari*, 40 Cal. 459; *Hogue v. Mackey*, 44 Kan. 277, 24 Pac. 477 (terms of payment). And see *Peerless Glass Co. v. Tinware Co.*, 121 Cal. 641, 54 Pac. 101.

²⁶¹ *Greene v. Bateman*, 2 Woodb. & M. (U. S.) 359, Fed. Cas. No. 5,762. See, also, *Singer v. Match Co.*, 117 Ga. 86, 43 S. E. 755.

²⁶² *Griffin v. O'Neil*, 48 Kan. 117, 29 Pac. 143; *Clark*, Cont. (2d Ed.) 205.

²⁶³ Where the seller, intending to offer cattle for \$261.50, by a *lapsus linguae* offered them for \$161.50, and the buyer, having good reason to suppose that the offer was a mistake, accepted it, and paid \$20 on account, and the seller tendered back the \$20 and repudiated the sale, the buyer was not entitled to maintain *replevin*. *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837. See, also, *Everson v. Granite Co.*, 65 Vt. 658, 27 Atl. 320. Cf. *Mummenford v. Randall*, 19 Ind. App. 44, 49 N. E. 40; post, p. 55.

²⁶⁴ Pol. Cont. (4th Ed.) 411.

²⁶⁵ Post, cc. 5, 6.

²⁶⁶ *Benj. Sales*, § 54. Mistaken belief that thing would answer a

sold failed to possess, or possessed, qualities which the parties believed, or did not believe, it to possess.²⁸⁷ Thus, where a woman sold an uncut stone to a jeweler for \$1, both being ignorant of the character of the stone and of its intrinsic value, and it turned out to be a diamond worth \$700, it was held that there was no such mistake as would avoid the contract.²⁸⁸ The parties may, indeed, make the possession of some quality a condition of the contract, as if they should contract for the sale of "this uncut diamond," in which case, if the contract were construed as making it a condition that the stone should be a diamond and it was in fact not such, there would be no contract, because the subject-matter of the contract was not in existence.²⁸⁹

Mistake as Nature of Promise Known to the Other Party.

Although a mistake on the part of one party in respect to the nature or qualities of the subject-matter of the sale, not induced by the conduct of the other party, has, as a rule, no effect upon the contract, the law will not allow one party to accept a prom-

certain purpose: *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Prideaux v. Bunnett*, 1 C. B. (N. S.) 613. Mistake as to condition of horse: *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28. Mistake as to solvency of maker of note bought through broker: *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95. See, also, *Sample v. Bridgforth*, 72 Miss. 293, 16 South. 876.

The fact that the buyer by mistake ordered a larger quantity than he desired is immaterial. *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N. W. 23; *Alfred Shrimpton & Son v. Brice*, 102 Ala. 655, 15 South. 452; *J. A. Coates & Sons v. Early*, 46 S. O. 220, 24 S. E. 805.

²⁸⁷ *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770.

²⁸⁸ *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

It is difficult to reconcile with the current of authority the case of *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531. Here the subject of sale was a blooded cow, believed by the parties to be barren, and for this reason a bargain was made to sell her at a price per pound equivalent to about \$80, but before delivery it was discovered that she was with calf, and hence worth \$750 to \$1,000, and it was held that the seller could rescind on the ground that the mistake affected the substance of the whole consideration.

²⁸⁹ *Clark*, Cont. (2d Ed.) 203; *Pol. Cont.* (3d Ed.) 450. See *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28. Cf. *Hood v. Todd*, 22 Ky. Law Rep. 837, 58 S. W. 783.

ise which he knows that the other party understands in a different sense from that in which he understands it.²⁷⁰ And, if the mistake of the one party as to the nature of the promise is known to the other, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent.²⁷¹ Thus, where the defendant was sued for the price of some oats, which he refused to accept on the ground that he had agreed and intended to buy old oats, and that those supplied were new, the jury were told that, if the plaintiff believed the defendant to believe that he was buying old oats, then he could not recover. The court of review, however, held that this was not enough to avoid the sale, but that in order to do so the plaintiff must have believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.²⁷²

Form of Contract.

Aside from the provisions of the statute of frauds, which will be considered later, no writing or other formality is necessary to effect a sale or contract to sell. If the contract is in writing, the ordinary rules of evidence apply. If the assent of the parties is not clearly expressed, it may be implied from their language²⁷³ or conduct,²⁷⁴ as if a customer takes goods from a

²⁷⁰ Anson, Cont. (8th Ed.) 138.

²⁷¹ Smith v. Hughes, L. R. 6 Q. B. 597; Gill v. McDowell (1903) 2 J. Rep. 463; Clark, Cont. (2d Ed.) 205.

²⁷² Smith v. Hughes, supra.

²⁷³ A "grumbling" assent. Joyce v. Swann, 17 C. B. (N. S.) 84, 101.

²⁷⁴ Stoudenmire v. Harper, 81 Ala. 242, 1 South. 857; Kinney v. Railroad Co., 82 Ala. 368, 3 South. 113; W. W. Kendall Boot & S. Co. v. Bain, 46 Mo. App. 581; Bicking v. Stevens, 69 Mo. App. 168; In re Cope's Estate, 191 Pa. 589, 43 Atl. 473; Excelsior Coal Min. Co. v. Coal Co., 23 Ky. Law Rep. 1834, 66 S. W. 373.

Shipment and delivery of goods is an acceptance of an offer to buy. Ober v. Smith, 78 N. C. 313; Whitman Agricultural Co. v. Strand, 8 Wash. 647, 36 Pac. 682; Aultman, Miller & Co. v. Nilson, 112 Iowa, 634, 84 N. W. 692; Burwell & Dunn Co. v. Chapman, 59 S. C. 581, 38 S. E. 222; National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965.

Using goods sent without order, with knowledge that the sender expects payment, constitutes an implied sale. Wellauer v. Fellows, 48 Wis. 105, 4 N. W. 114; Indiana Mfg. Co. v. Hayes, 155 Pa. 160, 26 Atl. 6; Louis Cook Mfg. Co. v. Randall, 62 Iowa, 244, 17 N. W. 507; Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367; Doerr v. Wool-

counter, and nothing is said as to price, a contract to pay their reasonable value is inferred.²⁷⁵ In the same way, where there is an express contract, and goods are sent which are not in accordance with it, but which nevertheless the buyer keeps, a contract to pay for them is implied. This doctrine is most frequently applied where the contract is for a certain quantity of goods, only a part of which are delivered.²⁷⁶

Sale by Suit.

There is one case where a sale takes place by implication of law rather than by the mutual assent of the parties, either express or implied. Where in an action for trespass to goods, or the detention or wrongful conversion thereof, the plaintiff recovers the value of the goods, as damages, and the defendant satisfies the judgment, the transaction operates as a sale of

sey, 7 N. Y. Supp. 662, 15 Daly, 284; *Indiana Mfg. Co. v. Hayes*, 155 Pa. 160, 28 Atl. 6; *Thompson v. Douglas*, 35 W. Va. 337, 13 S. E. 1015.

But no sale can be implied from acts of ownership by one ignorant that he is using goods of one who seeks to charge him as buyer. *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 706; *Grant v. Cole*, 8 Ala. 519; *Deysher v. Friebe*, 64 Pa. 383.

A person cannot, by sending goods to another, gain the right to treat him as buyer because he fails to notify the sender that he will not buy, unless the relation of the parties or other circumstances impose a duty to speak. *Hobbs v. Whip Co.*, 158 Mass. 194, 33 N. E. 495. But see *Thompson v. Douglas*, 35 W. Va. 337, 13 S. E. 1015.

²⁷⁵ Bl. Comm. bk. 2, c. 80; *Hoadly v. McLaine*, 10 Bing. 482, 487, per Tindal, C. J.; *Thompson v. Douglas*, 35 W. Va. 337, 13 S. E. 1015.

Where goods ordered of one person are supplied by another, by the acceptance and use of the goods, with notice that they have been so supplied, a contract of sale is implied. *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367.

²⁷⁶ *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Colonial Ins. Co. of New Zealand v. Insurance Co.*, 12 App. Cas. 123, 138; *Richardson v. Dunn*, 2 Q. B. 218; *Hart v. Mills*, 15 Mees. & W. 85; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Sentell v. Mitchell*, 28 Ga. 196; *Richards v. Shaw*, 67 Ill. 222; *Flanders v. Putney*, 58 N. H. 358; *Booth v. Tyson*, 15 Vt. 515, 518. *Oxendale v. Wetherell*, supra, has sometimes been disapproved. *Champlin v. Rowley*, 13 Wend. (N. Y.) 253; *Id.*, 18 Wend. 187; *Keln v. Tupper*, 52 N. Y. 555; *Witherow v. Witherow*, 16 Ohio, 238. See post, p. 233.

the goods by the plaintiff to the defendant.²⁷⁷ An unsatisfied judgment does not pass the property.²⁷⁸

Whether the Contract be of Sale a Question of Intention.

Whether a contract be a contract of sale, or some other kind of a contract, is a question of substance, not of form, and depends on the intention of the parties. Thus, as has been seen, it is a question of the real meaning of the parties, whether a contract is to be construed as a contract of sale or of bailment;²⁷⁹ and the law will look to the substance of the transaction, and not to the name by which the parties designate it.²⁸⁰ And if the mutual intention to buy and sell be wanting there is no sale.²⁸¹ Thus the sale of an article containing a hidden treasure is no sale of the treasure;²⁸² and if, by mis-

²⁷⁷ Jenk. 4 Cent. 88; *Cooper v. Shepherd*, 3 C. B. 266, 15 Law J. C. P. 237. On principle, the recovery would only have this effect where the value of the thing converted is included in the judgment. *Benj. Sales*, § 49.

²⁷⁸ *Brinsmead v. Harrison*, L. R. 6 C. P. 584, affirmed in L. R. 7 C. P. 547; *Ex parte Drake*, 5 Ch. Div. 866; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 16, 18 L. Ed. 129; *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43; *Marsden v. Cornell*, 62 N. Y. 215; *Brady v. Whitney*, 24 Mich. 154; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 700, 25 L. R. A. 42, 42 Am. St. Rep. 424. Contra: *Floyd v. Browne*, 1 Rawle (Pa.) 121, 18 Am. Dec. 602; *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *In re Merrick's Estate*, 5 Watts & S. (Pa.) 17.

²⁷⁹ Ante, p. 10.

²⁸⁰ Sale or lease. *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003.

²⁸¹ *Concord Coal Co. v. Ferrin*, 71 N. H. 331, 51 Atl. 283, 93 Am. St. Rep. 496.

Defendants' general agent, after being instructed not to add to defendants' stock by purchasing more goods, agreed with plaintiffs, who had knowledge of such instructions, to purchase a quantity of goods from them for defendants, and surreptitiously put them among the stock and sell them, and procure payment from defendants, as he might be able to do, without their knowledge. The goods were so furnished and sold, the proceeds going to defendants. Held, that plaintiffs could not sue for goods sold and delivered, as there was no valid sale. *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705.

²⁸² *Merry v. Green*, 7 Mees. & W. 623; *Huthmacher v. Harris' Adm'rs*, 38 Pa. 491, 80 Am. Dec. 502; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172;

take, other goods than those agreed upon be delivered, the property in the goods is not transferred.²⁸²

THE PRICE.

- 16. ASCERTAINMENT.** The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or may be determined by the course of dealing between the parties.
- 17. REASONABLE PRICE.** Where the price is not so determined, the buyer must pay a reasonable price. What is a reasonable price is a question of fact, dependent on the circumstances of each particular case.²⁸⁴

As has been stated, the consideration for a sale must be a price in money, paid or promised.²⁸⁵ Where the price has been expressly agreed on, no question can arise. There can be no sale if the parties have not agreed, expressly or by implication, upon the price or upon the manner in which it is to be determined.²⁸⁶ But the price need not be specified, if it can be ascertained in accordance with the contract.²⁸⁷

"Id certum est quod certum reddi potest."²⁸⁸ For example,

Ray v. Light, 34 Ark. 421. Cf. *Gardner v. Lane*, 9 Allen (Mass.) 492, 85 Am. Dec. 779. Ante, p. 63.

²⁸² *Gardner v. Lane*, 9 Allen (Mass.) 492, 85 Am. Dec. 779.

²⁸⁴ Sales Act, § 9 (1), (4).

²⁸⁵ Ante, p. 12.

The discharge of an existing indebtedness of the seller to the buyer is sufficient. *Patton v. Cardiner*, 72 Vt. 47, 47 Atl. 110; *Hendrie & Bolthoff Mfg. Co. v. Collins*, 29 Colo. 102, 67 Pac. 164; *Lewter v. Lindley* (Tex. Civ. App.) 81 S. W. 776. Or the payment or a promise to pay a debt of the seller. *Meade v. Smith*, 16 Conn. 346; *Bell v. Greenwood*, 21 Ark. 249; *Hackley v. Cooksey*, 35 Mo. 398.

²⁸⁶ *Bigley v. Risher*, 63 Pa. 152; *Foster v. Mining Co.*, 68 Mich. 188, 36 N. W. 171; *Borland v. Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32; *Reynolds v. Miller*, 79 Hun (N. Y.) 113, 29 N. Y. Supp. 405; *Greer v. Bank*, 128 Mo. 559, 80 S. W. 319; *Still v. Cannon*, 13 Okl. 491, 75 Pac. 284.

²⁸⁷ *Valpy v. Gibson*, 4 C. B. 837, at page 864, per Wilde, C. J.; *Joyce v. Swann*, 17 C. B. (N. S.) 84, 100; *Holbrook v. Setchel*, 114 Mass. 435; *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. 672; *Clement v. Drybread*, 108 Iowa, 701, 78 N. W. 235.

²⁸⁸ *Brown v. Bellows*, 4 Pick. (Mass.) 179, 189.

the price may be left to be fixed by the market price of the commodity,²⁸⁹ or by the price another article shall fetch at auction,²⁹⁰ or by the price the thing sold may afterwards fetch,²⁹¹ or by future arrangement,²⁹² or by the valuation of a third person.²⁹³ Where there is a contract to sell at a price to be fixed by a third person, and such third person cannot or does not fix the price, the contract is avoided,²⁹⁴ even if the failure to fix the price is caused by one of the parties; but, if the goods have been delivered and appropriated by the buyer, he is liable for their reasonable value.²⁹⁵ But as the assent to the

²⁸⁹ Price 10 cents less than Milwaukee price on any day seller might name. *McConnell v. Hughes*, 29 Wis. 537. Thirty-five cents less than St. Louis market price on day of delivery. *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681. Market price when buyer should demand payment. *McBride v. Silverthorne*, 11 U. C. Q. B. 545; *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. 672. And see *Lund v. McCutchen*, 83 Iowa, 755, 49 N. W. 998; *Beardsley v. Smith*, 61 Ill. App. 340; *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734. Price to be regulated by the price of gold. *Ames v. Qulmby*, 96 U. S. 324, 24 L. Ed. 635. *Of. Acebal v. Levy*, 10 Bing. 376, 382.

²⁹⁰ *Cunningham v. Brown*, 44 Wis. 72.

²⁹¹ *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. 672. And see *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222.

²⁹² Where the sale is for a reasonable price, to be afterwards agreed upon, the title passes, if such is the mutual intention, though no price is afterwards agreed upon. *Greene v. Lewis*, 85 Ala. 221, 4 South. 740, 7 Am. St. Rep. 42. *Of. Wittkowsky v. Wasson*, 71 N. C. 451. Where there is actual delivery, but no agreement as to the price or means of making it certain, the title does not pass; but, if the buyer consume the goods, he must pay a reasonable price. *Albermarle Lumber Co. v. Wilcox*, 105 N. C. 34, 10 S. E. 871.

²⁹³ *Brown v. Bellows*, 4 Pick. (Mass.) 179, 189; *Willingham v. Veal*, 74 Ga. 755; *Leonard v. Cox*, 64 Mo. 32; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

²⁹⁴ *Thurnell v. Balbirnie*, 2 Mees. & W. 786; *Cooper v. Shuttleworth*, 25 Law J. Exch. 114; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507; *Fuller v. Bean*, 30 N. H. 181; *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964. See, also, *Hutton v. Moore*, 28 Ark. 382; *Preston v. Smith*, 67 Ill. App. 613; *Benj. Sales*, § 87.

²⁹⁵ *Clarke v. Westrope*, 25 Law J. C. P. 287; *Humaston v. Telegraph Co.*, 20 Wall. (U. S.) 20, 22 L. Ed. 279; *Kenniston v. Ham*, 9 Post. (N. H.) 501. The same rule was applied where the goods had been constructively, but not actually, delivered, on the ground that prevention was equivalent to performance. *Smyth v. Craig*, 3 Watts & S.

sale may be implied, as well as express, so the assent to the payment of a reasonable price may be implied from the circumstances.²⁹⁶ This implication arises naturally when the sale has been executed, but an agreement to pay a reasonable price may also be implied in an executory contract.²⁹⁷ Such cases are, of course, to be distinguished from cases in which the contract of sale has never been completed, by reason of failure to agree upon a price.²⁹⁸ What is a reasonable price is a question of fact, dependent on the circumstances of each particular case; for, while a reasonable price is ordinarily the market price, the market price may be unreasonable, from accidental circumstances, as on account of the commodity having been kept back by the seller himself.²⁹⁹

(Pa.) 14. See Sales Act, § 10. Cf. Sale of Goods Act, § 9; post, p. 233.

²⁹⁶ *Acebal v. Levy*, 10 Bing. 376; *Bennett v. Adams*, 2 Cranch, C. C. 551 (U. S.) Fed. Cas. No. 1,316; *Taft v. Travis*, 136 Mass. 95; *James v. Muir*, 33 Mich. 223; *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; *McEwen v. Morey*, 60 Ill. 32; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290; *Lefurgy v. Stewart*, 69 Hun (N. Y.) 614, 23 N. Y. Supp. 537.

²⁹⁷ *Hoadly v. McLaine*, 10 Bing. 482; *Valpy v. Gibson*, 4 Q. B. 837.

²⁹⁸ *Bigley v. Risher*, 63 Pa. 152; *Foster v. Mining Co.*, 68 Mich. 188, 36 N. W. 171; *Whiteford v. Hitchcock*, 74 Mich. 208, 41 N. W. 898.

²⁹⁹ *Acebal v. Levy*, 10 Bing. 376, per Tindal, C. J., 383; *James v. Muir*, 33 Mich. 223; *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

CHAPTER II.**FORMATION OF CONTRACT (Continued)—UNDER THE STATUTE OF FRAUDS.**

- 18-20. What Contracts are Within the Statute.
- 21-22. What are Goods, Wares, and Merchandise.
- 23. What is a Contract for the Price or Value of £10 (\$50).
- 24-26. Acceptance and Receipt.
- 27-29. Acceptance.
- 30-31. Actual Receipt.
- 32-33. Earnest or Part Payment.
- 34-36. The Note or Memorandum.
- 37-38. Signature of the Party.
- 39-40. Agents Authorized to Sign.
- 41. Effect of Noncompliance with the Statute.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

- 18. The seventeenth section of the English statute of frauds, which has been substantially followed in most of the states and territories of the United States, enacts that "no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except
 - (a) The buyer shall accept part of the goods so sold, and actually receive the same,
 - (b) Or give something in earnest to bind the bargain, or in part payment,
 - (c) Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."
- 19. The statute of frauds applies to executory as well as executed contracts of sale.
- 20. The statute does not apply to contracts for work, labor and materials. The rule for determining whether the contract is for work, labor and materials, or a contract of sale, varies in different jurisdictions.
 - (a) **ENGLISH RULE.** The English rule, which is followed in some states, is that a contract whereby the property in a chattel is to be transferred for a price from one person to another is a contract of sale, and is within the statute, although the chattel is to be the product

of the work, labor, and materials of the person who is to transfer the property.

- (b) **MASSACHUSETTS RULE.** The Massachusetts rule, which is followed in some states, is the same, except that if the chattel is to be manufactured especially for the buyer, upon his special order, and is not such as the seller in his ordinary business manufactures for the general market, the contract is for work, labor, and materials, and is not within the statute.
- (c) **NEW YORK RULE.** The New York rule, which is followed in some states, is that a contract for the sale of a chattel not in existence, which the seller is to manufacture, is a contract for work, labor, and materials, and is not within the statute; but, if the chattel is in existence, the contract is one of sale, and is within the statute, although the seller is to adapt it to the use of the buyer.

The common law, which recognized the validity of verbal contracts of sale of personal property for any amount, and however proved, was greatly modified by the seventeenth section of the statute of 29 Car. II. c. 3, known as the "statute of frauds," which has been quoted above. To reproduce here the language of the various similar enactments in the United States would be impossible,¹ nor is it necessary to do so, as their provisions are in the main substantially the same as those of the English original. The latter will therefore serve as the basis of discussion.

Executed and Executory Contracts.

A question arose at an early day, on which in England the cases were conflicting, whether the words "contract of sale," as used in the statute, applied to executory contracts, or merely to executed contracts, of sale.² The question was settled in

¹ This section seems not to be in force in Alabama, Delaware, Illinois, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia.

Some changes have been made by the English Sale of Goods Act, § 4, and still others by the Sales Act, § 4.

² That executory contracts were not within the statute, see *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burrows, 2101; *Groves v. Buck*, 3 Maule & S. 178. Contra, *Rondeau v. Wyatt*.

England by "Lord Tenterden's Act,"² so called, which enacted that the provisions of the seventeenth section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The two enactments must be construed together,³ and Lord Tenterden's act appears to be merely declaratory of the true construction of the statute of frauds.⁴ In the United States, it has been universally held, without the intervention of the Legislature, and in conformity with the apparent policy and natural construction of the statute, that it applies as well to executory as to executed sales.⁵

Contract of Sale or Contract for Work, Labor, and Materials—English Rule.

Another question has arisen as to the meaning of "contract of sale," on which there was long a conflict of opinion in England and on which different conclusions have been reached in the United States, namely, whether a contract for the sale of goods to be afterwards manufactured is a "contract of sale," or a mere contract for work and labor done and materials furnished, to which the statute does not apply.⁷ The conclusion

² H. Bl. 63; *Cooper v. Elston*, 7 Term R. 14; *Garbutt v. Watson*, 5 Barn. & Ald. 613.

³ 9 Geo. IV. c. 14, § 7.

⁴ *Chalm. Sale*, 8; *Scott v. Railway Co.*, 12 Mees. & W. 33; *Harman v. Reeve*, 18 C. B. 587, 25 Law J. C. P. 257.

⁵ *Langd. Cas. Sales*, 1025.

⁶ *Newman v. Morris*, 4 Har. & McH. (Md.) 421; *Bennett v. Hull*, 10 Johns. (N. Y.) 364; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187; *Jackson v. Covert's Adm'r*, 5 Wend. (N. Y.) 139; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Hight v. Ripley*, 19 Me. 137; *Edwards v. Railway Co.*, 48 Me. 379; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Carman v. Smick*, 15 N. J. Law, 252; *Finney v. Apgar*, 31 N. J. Law, 266; *Cason v. Cheely*, 6 Ga. 554; *Mechanical Boller-Cleaner Co. v. Kellner*, 62 N. J. Law, 544, 43 Atl. 599.

Sales Act, § 4, makes changes to express more accurately the construction given by Lord Tenterden's act and by the courts.

⁷ *Benj. Sales*, §§ 94-107.

which has finally been reached in England, and in several states in America, is that if the contract is intended to result in transferring for a price a chattel it is a contract for the sale of a chattel, notwithstanding that the chattel is not in existence at the time of the contract, and is to be the product of the labor and materials of the seller, and that unless the contract is intended to result in the transfer of a chattel the contract is not one of sale. This test was first clearly stated and applied in the leading case of *Lee v. Griffin*,⁸ decided in the Queen's Bench in 1861. That action was brought by a dentist to recover for two sets of artificial teeth ordered by a deceased lady of whom the defendant was executor, and it was held that the contract was one of sale, and not for work, labor, and materials. Blackburn, J., said: "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy."

Before the case of *Lee v. Griffin*, three other principles had been suggested in England as affording a test in such cases, and as the earlier English views have been influential in shaping the decisions in this country, and throw light upon the question involved, they may be briefly stated: First. It was suggested that, if the subject-matter of the contract is not in existence, the contract is not for the sale of goods.⁹ Thus in *Groves v. Buck*¹⁰ it was held on this ground that a contract for the sale of oak pins to be cut by the plaintiff out of slabs owned by him was not within the statute. Second. It was suggested that, if the materials be furnished by the employer, the contract is for work and labor, and not of sale; but that if the materials be furnished by the workman, who makes the chattel, he cannot maintain work and labor, because his labor is bestowed

⁸ 1 Best & S. 272, 30 Law J. Q. B. 252.

⁹ *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 613, per Abbott, C. J.; *Rondeau v. Wyatt*, 2 H. Bl. 63, per Lord Loughborough; *Cooper v. Elston*, 7 Term R. 14, per Lord Kenyon, C. J.

¹⁰ 3 Maule & S. 178.

on his own materials and for himself.¹¹ The first branch of this rule falls within *Lee v. Griffin*, because, if the materials are furnished by the employer, there can be no sale of them to him. But the second branch of the rule is inaccurate, since a man may be employed to do work on his own materials without an intention on the part of himself and his employer to transfer the property in the completed article; for example, to expend work and materials in perfecting an invention.¹² Third. It was suggested that the true test was "whether the work and labor is the essence of the contract, or whether it is the materials that are found."¹³ But the fatal objection to this test, as pointed out by Benjamin,¹⁴ and indeed to any test except that applied in *Lee v. Griffin*, is that, however small the relative value of the materials to the labor, as in the case of a painting, the employer cannot get title to the thing except through the transfer of the property in it from the maker. And it is the acquisition of the thing by the employer which the contract really contemplates. It is true that extreme cases may be put, such as that of an attorney employed to draw a deed and using his own paper and ink, or that of a man sending a button to be used by his tailor in making a coat. But such trifling matters cannot be considered as having entered into the contemplation of the parties, nor as forming part of the real consideration, and are to be disposed of by the rule, "*De minimis non curat lex.*"¹⁵

Same—Massachusetts Rule.

In the English case of *Garbutt v. Watson*,¹⁶ where a contract for the sale of flour to be manufactured was held to be within the statute, Abbott, C. J., remarked: "In *Towers v. Osborne* [1 Strange, 506], the chariot which was ordered to be made would never, but for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for

¹¹ *Smith v. Surman*, 9 Barn. & C. 568, per Bayley, J.; *Atkinson v. Bell*, 8 Barn. & C. 277, per Bayley, J.

¹² *Grafton v. Armitage*, 2 C. B. 336, 15 Law J. C. P. 20. Or if a farrier be employed professionally, using his own medicines, there is no sale of the medicine, but the contract is for work, labor, and materials. *Clark v. Mumford*, 3 Camp. 37; *Langd. Cas. Sales*, 1039.

¹³ *Clay v. Yates*, 1 Hurl. & N. 73, 25 Law J. Exch. 237.

¹⁴ *Benj. Sales*, § 106.

¹⁵ *Benj. Sales*, § 107.

¹⁶ 5 Barn. & Ald. 613.

the purpose of general sale, and sold this flour to the defendant as part of their general stock." In accordance with this dictum, though not expressly upon its authority, it was held in *Mixer v. Howarth*¹⁷ that a contract to build a buggy for the defendant out of materials partly wrought, but not put together, was not a contract of sale within the statute, and Shaw, C. J., said that "when the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies." In *Gardner v. Joy*,¹⁸ on the other hand, where the defendant ordered 100 boxes of candles, at 21 cents a box, which the plaintiff was to manufacture, the same judge held that the case was not distinguishable from *Garbutt v. Watson*. And in a later case¹⁹ he laid down the distinction that "when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made and finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Goddard v. Binney*,²⁰ in which the facts are similar to those in *Mixer v. Howarth*, the court refers to *Lee v. Griffin*, but adheres to the Massachusetts rule, the correctness and justice of which it approves.

Same—New York Rule.

The principle acted on in the earlier English cases, that a contract for the sale of an article not in existence is not within the statute,²¹ is the foundation of the so-called New York

¹⁷ 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

¹⁸ 9 Metc. (Mass.) 177.

¹⁹ *Lamb v. Crafts*, 12 Metc. (Mass.) 356.

²⁰ 115 Mass. 450, 15 Am. Rep. 112. See, also, *Spencer v. Cone*, 1 Metc. (Mass.) 283; *Waterman v. Melgs*, 4 Cush. (Mass.) 497; *Clark v. Nichols*, 107 Mass. 547; *Dowling v. McKenney*, 124 Mass. 480; *May v. Ward*, 134 Mass. 127.

An oral contract whereby a dealer agreed to furnish, at a price exceeding \$50, bottles of specified sizes, and made of a kind of glass used only by a certain manufacturer, and according to his models, is a contract for the sale of goods, within the meaning of the statute of frauds, and not one to furnish labor and materials. *Smalley v. Hamblin*, 170 Mass. 380, 40 N. E. 626.

²¹ Ante, p. 65.

rule. Thus in *Crookshank v. Burrell* ²² it was held that a contract to manufacture the woodwork of a wagon was not within the statute, and in *Sewall v. Fitch* ²³ the same decision was reached in regard to a contract to sell rails which were to be made by the seller; and the rule was enunciated that a contract for the sale of goods existing in *solido* is within the statute, but that a contract for the sale of goods not yet made, and to be delivered at a future day, is a contract for work and labor, and is not within the statute. In *Downs v. Ross*,²⁴ however, a limitation of this rule was introduced, and it was held that a contract to sell wheat, part of which was to be cleaned and part threshed, was within the statute, Bronson, J., observing that, "if the thing exist at the time in *solido*, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute." The rule ²⁵ and the limitation ²⁶ have been followed in the later New York cases. The cases are discussed and reconciled in *Cooke v. Millard*,²⁷ in which it was held that a contract for the sale of lumber which the seller was to dress and put in condition to fill the order of the buyer was within the statute. The rule is there stated that an agreement for the sale of a commodity not in existence, but which the seller is to manufacture or put in condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale; but that, when the chattel is in existence, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the use of the purchaser. Dwight, C., who delivered the opin-

²² 18 Johns. (N. Y.) 58, 9 Am. Dec. 187.

²³ 8 Cow. (N. Y.) 215.

²⁴ 23 Wend. (N. Y.) 270.

²⁵ *Robertson v. Vaughn*, 5 Sandf. (N. Y.) 1; *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Parker v. Schenck*, 28 Barb. (N. Y.) 38; *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517; *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788. See *Hinds v. Kellogg* (Com. Pl. N. Y.) 13 N. Y. Supp. 922.

²⁶ *Smith v. Railroad Co.*, *43 N. Y. 180; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Alfred Shrimpton & Sons v. Dworsky*, 2 Misc. Rep. 123, 21 N. Y. Supp. 461.*

²⁷ 65 N. Y. 352, 22 Am. Rep. 619.

ion, observed in regard to *Lee v. Griffin* that, if the subject were open, no more convenient rule than that of *Lee v. Griffin*, which is at once so philosophical and comprehensible, could be adopted, but that it was too late to adopt it in full.

Same—Rule Elsewhere in United States.

It would be difficult, if not impossible, to classify the American cases as falling within the English, the New York, or the Massachusetts rule.²⁸ The latter rule has, however, met with most general approval,²⁹ and has in a recent case been express-

²⁸ See *Cason v. Cheely*, 6 Ga. 554; *Bird v. Muhlinbrink*, 1 Rich. Law (S. C.) 199; *Allen v. Jarvis*, 20 Conn. 38; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Ellis v. Railroad Co.*, 7 Colo. App. 350, 43 Pac. 457; *Helntz v. Burkhard*, 29 Or. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777; *Puget Sound Mach. Depot v. Rigby*, 13 Wash. 264, 43 Pac. 39. In *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55, it was held that a contract to buy what spokes plaintiff should saw at his mill was within the statute, and the opinion cites *Lee v. Griffin*, 1 Best. & S. 272, 30 Law J. Q. B. 252; but the court draws a distinction like that at one time suggested in England (*supra*) between contracts of sale and those in which the labor and skill of the workman are the essence of the contract. See, also, *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218. Cf. *Gilman v. Hill*, 38 N. H. 311. See, also, *Hight v. Ripley*, 19 Me. 137; *Abbott v. Gilchrist*, 38 Me. 260; *Edwards v. Railway*, 48 Me. 379, 54 Me. 105; *Crockett v. Scribner*, 64 Me. 447. A contract to paint a portrait is not within the statute. *Turner v. Mason*, 65 Mich. 662, 32 N. W. 846.

"From a very early period it has been the settled law of Maryland . . . that, when work and labor are to be bestowed by the vendor upon the article sold before it is to be delivered, the contract is not within the statute; and the reason is that, when work and labor are necessary to prepare an article for delivery, the work and labor to be done by the vendor form part of the consideration of the contract, and, as these are not within the statute, the sale is not a sale of goods, wares, and merchandise." *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033. See, also, *Elchelberger v. McCauley*, 5 Har. & J. (Md.) 213, 9 Am. Dec. 514; *Rentch v. Long*, 27 Md. 188.

²⁹ *Finney v. Apgar*, 31 N. J. Law, 271 (cf. *Pawelski v. Hargreaves*, 47 N. J. Law, 334, 54 Am. Rep. 162); *Meincke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722, distinguishing *Hardell v. McClure*, 1 Chand. (Wis.) 271, 2 Plin. 289, in which the modern English rule was approved; *O'Neill v. Mining Co.*, 3 Nev. 141; *Orman v. Hager*, 3 N. M. 331, 9 Pac. 363; *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1060, 14 L. R. A. 230; *Brown & Haywood Co. v. Wunder*, 64 Minn. 450,

ly adopted in Missouri.⁸⁰ In some states an attempt has been made to settle the question by statute, as in Iowa, where it is provided that where the property sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money are necessary to be expended in producing or procuring the same, the statute shall not apply.⁸¹

Chattel Intended for a Fixture.

Contracts for furnishing an article, and fixing it to the freehold, are to be distinguished from contracts of sale.⁸² In such cases the intention is not to make a sale of movables, but to make improvements on the real property of which the article furnished, upon being affixed, becomes a part; and the consideration to be paid is, not for a transfer of chattels, but for work

67 N. W. 357, 32 L. R. A. 593 (cf. *Phipps v. McFarlane*, 3 Minn. 109 [Gill. 61] 74 Am. Dec. 743; *Brown v. Sanborn*, 21 Minn. 402; *Russell v. Railway Co.*, 39 Minn. 145, 39 N. W. 302); *Mechanical Boiler-Cleaner Co. v. Kellner*, 62 N. J. Law, 544, 43 Atl. 599; *Williams-Haywood Shoe Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342; *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952.

A contract by which defendants agree to furnish a monument for a certain amount, to be erected by a state on a battlefield, is not a contract for sale of goods, within the statute of frauds, though defendants are not bound to bestow their personal skill and labor thereon, but may get others to make it for them. *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788.

The court says that the case comes clearly within the Massachusetts rule, which it regards as preferable, and that it makes no difference that the defendants were not bound to bestow their personal skill and labor on the monument, but were at liberty to get others to make it for them, making the special order the test. Cf. *Ellison v. Brigham*, 38 Vt. 64.

The Massachusetts rule is adopted by Sales Act, § 4 (2).

⁸⁰ *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; *Burrell v. Highleyman*, 33 Mo. App. 183; *Pike Electric Co. v. Drug Co.*, 42 Mo. App. 272. Also in *Wolfenden v. Wilson*, 33 U. C. Q. B. 442.

⁸¹ Where defendant contracted orally to sell and deliver to plaintiff, in a marketable condition, certain growing oats, the sale was not within the exception. *Mighell v. Dougherty*, 86 Iowa, 480, 53 N. W. 402, 17 L. R. A. 755, 41 Am. St. Rep. 511. See, also, *Lewis v. Evans*, 108 Iowa, 296, 79 N. W. 81; *Diersen v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 889; *Flynn v. Dougherty*, 91 Cal. 609, 27 Pac. 1060, 14 L. R. A. 230.

⁸² *Benj. Sales*, § 108.

and labor done and materials furnished in adding something to the land.⁸⁵

Similarly, a contract to make improvements upon a chattel belonging to the employer is a contract for work, labor, and materials.⁸⁶

Auction Sales.

Although it was questioned by Lord Mansfield whether the statute applied to sales of goods at auction,⁸⁷ it is universally held that it applies to them as well as to private sales.⁸⁸

Contract for Exchange.

A contract of exchange or barter is regarded as a contract of sale within this section.⁸⁹

Contract for Resale.

A stipulation in a contract of sale that the seller may repurchase or that the buyer may resell is not to be regarded as an independent contract of sale, and, if the original contract has been taken out of the statute, by delivery of the goods or otherwise, is not within the statute.⁹⁰

⁸⁵ *Tripp v. Armitage*, 4 Mees. & W. 687; *Clark v. Bulmer*, 11 Mees. & W. 243; *Scales v. Wiley*, 68 Vt. 89, 33 Atl. 771.

⁸⁶ *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271.

⁸⁷ *Simon v. Motivos*, 8 Burrows, 1921, 1 Wm. Bl. 599.

⁸⁸ *Hinde v. Whitehouse*, 7 East, 558, per Lord Ellenborough; *Kenworthy v. Schofield*, 2 Barn. & C. 945; *Davis v. Rowell*, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Davis v. Robertson*, 1 Mill, Const. (S. C.) 71, 12 Am. Dec. 611; *Sanderlin v. Trustees*, R. M. Charlt. (Ga.) 551.

⁸⁹ *Ash v. Aldrich*, 67 N. H. 581, 39 Atl. 442; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 908. And see *Dowling v. McKenney*, 124 Mass. 478; *Browne*, St. Frauds, § 293.

A contract to deliver goods in payment of a debt is within the statute. *Sawyer v. Ware*, 36 Ala. 675; *Gorman v. Brossard*, supra. Contra: *Woodford v. Patterson*, 32 Barb. (N. Y.) 630.

⁹⁰ *Williams v. Burgess*, 10 Adol. & El. 499; *Fay v. Wheeler*, 44 Vt. 292; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394.

WHAT ARE GOODS, WARES, AND MERCHANDISE.**21. "Goods, wares, and merchandise" comprehend:**

- (a) All corporeal movable property.
- (b) In the United States, generally, (but not in England), incorporeal property, such as shares, promissory notes, bank bills, etc.
- (c) *Fructus naturales* and *fructus industriales*, the ownership whereof is to pass to the buyer after severance thereof from the soil.
- (d) *Fructus industriales* (perhaps) also when such ownership is to pass before severance.

22. "Goods, wares, and merchandise" do not comprehend:

- (a) *Fructus naturales*, the ownership whereof is to pass before severance [and from the further growth whereof the buyer is to derive benefit].³⁹
- (b) Tenants' fixtures sold while unsevered.

Incorporeal Property—Choses in Action.

In England the term "goods, wares, and merchandise" has been limited to corporeal movable property, and is held not to include shares, stock, documents of title, choses in action, and other incorporeal rights and property.⁴⁰ In the United States, however, the term is as a rule held to include incorporeal property, such as stock,⁴¹ bills and notes,⁴² and bank bills.⁴³ "The

³⁹ If *Marshall v. Green*, 1 C. P. Div. 35, and the similar decisions in this country, be good law, the words within the brackets must stand. See post, p. 75.

⁴⁰ *Humble v. Mitchell*, 11 Adol. & El. 205; *Knight v. Barber*, 16 Mees. & W. 69, 16 L. J. Exch. 18; *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Duncuft v. Albrecht*, 12 Sim. 189; *Colonial Bank v. Whinney*, 30 Ch. Div. 261, 286; *Benj. Sales*, § 111. See *Evans v. Davies* [1893] 2 Ch. Div. 216.

⁴¹ *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Boardman v. Cutter*, 128

⁴² *Baldwin v. Williams*, 3 Metc. (Mass.) 367; *Gooch v. Holmes*, 41 Me. 523; *Pray v. Mitchell*, 60 Me. 430, 435; *Hudson v. Welr*, 29 Ala. 294; *Greenwood v. Law*, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688 (bond and mortgage). Contra, *Whittemore v. Gibbs*, 24 N. H. 484; *Beers v. Crowell*, Dud. (Ga.) 28 (United States treasury checks on Bank of United States); *Vawter v. Griffin*, 40 Ind. 600.

⁴³ *Riggs v. Magruder*, 2 Cranch, C. C. (U. S.) 143, Fed. Cas. No. 11,828; *Gooch v. Holmes*, 41 Me. 523. Gold coin, when the subject of a contract of sale, is within the statute. *Peabody v. Speyers*, 56 N. Y. 230.

words of the statute," it has been said, "have never been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form";⁴⁴ but some courts have held a simple contract debt to be within the statute.⁴⁵ In some states a broader rule is required by the language of the statute, as in New York, California, Wisconsin, and Minnesota, where the provision expressly includes choses in action,⁴⁶ and in Florida, where it uses the term "personal property."⁴⁷

Interest in Land—Fourth Section of the Statute.

The fourth section of the statute of frauds, which has been substantially enacted in most states of this country, provides that "no action shall be brought * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." When a contract of sale is made, the sub-

Mass. 388; *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Fine v. Hornsby*, 2 Mo. App. 61; *Bernhardt v. Walls*, 29 Mo. App. 206. See *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907; *Green v. Brookins*, 23 Mich. 48, 54, 9 Am. Rep. 74; *Gadsden v. Lance*, McM. Eq. (S. C.) 87, 37 Am. Dec. 548; *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50. And see *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611. Contra: *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396, which follows the English rule, notwithstanding a dictum to the contrary in *Colvin v. Williams*, 3 Har. & J. (Md.) 38, 5 Am. Dec. 417.

⁴⁴ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459, per Gray, C. J. See, also, *Meehan v. Sharp*, *supra*.

An invention, before letters patent are obtained, is not within the statute. *Somerby v. Buntin*, *supra*; *Blakeney v. Goode*, 30 Ohio St. 350; *Dalzell v. Manufacturing Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749. Cf. *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279.

⁴⁵ *Walker v. Supple*, 54 Ga. 179 (accounts); *French v. Schoonmaker*, 69 N. J. Law, 6, 54 Atl. 225.

⁴⁶ *Artcher v. Zeh*, 5 Hill (N. Y.) 200; *Peabody v. Speyers*, 56 N. Y. 230; *Allen v. Aguirre*, 7 N. Y. 543; *Mayer v. Child*, 47 Cal. 142; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97. See Sales Act, § 4 (1).

⁴⁷ *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359.

ject-matter of which is something attached to the soil, the question frequently arises whether such sale is of an interest in land, and hence whether it is within the fourth section, or whether it is a sale of goods, wares, and merchandise, and hence within the seventeenth section, or whether it is neither. The question which section governs may be of vital importance, because the fourth section requires a written memorandum or note under all circumstances and whatever the amount, while under the seventeenth section the necessity of a writing does not exist if the amount is under £10, or if the provisions in respect of performance or payment have been satisfied.

Fructus Naturales and Fructus Industriales.

Inasmuch as "goods, wares, and merchandise" comprehends all movable corporeal property, an executory contract for the sale of a thing attached to the soil, for example, trees, if the thing is to be severed from the soil before the sale, is within the seventeenth section, and is not within the fourth section, of the statute; for, though the subject of sale be an interest in land when the contract is made, it will, by severance from the soil, become "goods, wares and merchandise" when the sale is executed.⁴⁸ "The agreement is that the thing shall be rendered into goods, and then in that state sold. It is an executory agreement for the sale of goods not existing in that capacity at the time of the contract."⁴⁹ But, if the contract contemplates a present sale, a different question arises, which is to be determined in the case of growing crops upon a somewhat artificial distinction.

⁴⁸ *Smith v. Surman*, 9 Barn. & C. 561 (potatoes); *Washbourn v. Burrows*, 1 Exch. 107, per curiam; *Watts v. Friend*, 10 Barn. & C. 446; *Parker v. Staniland*, 11 East, 362; *Sainsbury v. Matthews*, 4 Mees. & W. 343; *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Clafin v. Carpenter*, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Drake v. Wells*, 11 Allen (Mass.) 141; *Fletcher v. Livingston*, 153 Mass. 338, 390, 26 N. E. 1001; *Banton v. Shorey*, 77 Me. 48, 51; *Killmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun (N. Y.) 792; *Upson v. Holmes*, 51 Conn. 500. See, also, *Slocum v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432, per Bedle, J.; *Green v. Railroad Co.*, 73 N. C. 524; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Cool v. Lumber Co.*, 87 Ind. 531; *Benj. Sales*, §§ 118, 119; *Blackb. Sales*, p. 5.

⁴⁹ *Blackb. Sale*, p. 9.

A distinction exists between what are known as "fructus naturales," which are the natural product of the soil, as trees and natural grass, and "fructus industriales," or emblements, which are the product of annual labor, as wheat or potatoes, and which the tenant of an estate of uncertain duration had the right to take, if growing at the determination of his estate. Fructus naturales are an interest in land, but fructus industriales are chattels, and not an interest in land. From the character of fructus naturales as an interest in land, it follows that an agreement vesting a present interest in them although in contemplation of immediate severance, is within the fourth section. Such, at least, is the prevailing rule in this country,⁵⁰ and was supposed to be the law under all circumstances in England⁵¹ until the case of *Marshall v. Green*,⁵² in 1875, in which it was held that a sale of standing timber, to be cut by the purchaser as soon as possible, was within the seventeenth, and not within the fourth, section. It is said by the English editors of Benjamin⁵³ that this decision is open to criticism, and must be supported either on the ground that title was not to pass until severance, which would bring it within the principle governing executory contracts of sale above stated, or that

⁵⁰ *White v. Foster*, 102 Mass. 375; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Olmstead v. Niles*, 7 N. H. 522; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Thomson v. Poor*, 57 Hun (N. Y.) 288, 10 N. Y. Supp. 597; *Id.*, 67 Hun (N. Y.) 653, 22 N. Y. Supp. 570; *Slocum v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Walton v. Lowrey*, 74 Miss. 484, 21 South. 243; *Seymour v. Cushway*, 100 Wis. 580, 76 N. W. 709, 69 Am. St. Rep. 957; *Kirkeby v. Erickson*, 90 Minn. 299, 96 N. W. 703, 101 Am. St. Rep. 411; *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126; *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539.

⁵¹ *Rodwell v. Phillips*, 9 Mees. & W. 501; *Crosby v. Wadsworth*, 6 East, 602; *Teal v. Auty*, 2 Brod. & B. 99 (trees); *Scorell v. Boxall*, 1 Younge & J. 396. Contra: *Anonymous*, 1 Ld. Raym. 182.

⁵² 1 C. P. Div. 35.

⁵³ *Benj. Sales*, § 126. See, also, *Kerr, Dig. Law Sales*, p. 5 (a).

it must be taken to have introduced the limitation that, even when the property in *fructus naturales* passes before severance, if the intention is that the buyer is to derive no benefit from their further growth, the sale is within the seventeenth, and not within the fourth, section. Apparently the judges who decided *Marshall v. Green* took the latter view of the case, and the same has been taken by some courts in the United States.⁵⁴ In a later English case,* *Chitty, J.*, refused to apply the limitation to a contract to sell building materials in a building, to be removed within two months by the buyer, and his criticisms apply equally to *Marshall v. Green* and to the American cases referred to. "It is sold," he says, "as building materials, and, if the intention of the parties prevailed, it might mean that it is sold as a chattel, but the point still is that it is not a chattel at the time of the sale, and the statute of frauds, so far as I can see, does not enable parties to say: 'We will agree to treat this thing as a chattel, when in point of law it is a hereditament.'" ⁵⁵ In some states, where the above limitation of the rule is not

⁵⁴ *Sterling v. Baldwin*, 42 Vt. 306; *McClintock's Appeal*, 71 Pa. 385; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am. Dec. 481. See, also, *Bostwick v. Leach*, 8 Day (Conn.) 476; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; *Scoggin v. Slater*, 22 Ala. 687; *Leonard v. Medford*, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; *Tilford v. Dotson*, 106 Ky. 755, 51 S. W. 583; *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918. If the timber is to be taken off by the purchaser without specification as to time, the contract is within the fourth section. *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203; *Pattison's Appeal*, 61 Pa. 294, 100 Am. Dec. 637; *Miller v. Stevens*, 100 Mass. 518, 1 Am. Rep. 189, 97 Am. Dec. 123.

**Lavery v. Pursell*, 39 Ch. Div. 508.

⁵⁵ Sales Act, § 76 (1), following the English act, declares that "goods" includes "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." So far as concerns *fructus naturales*, buildings sold as materials, and fixtures, which are agreed to be severed before sale, this declares what has been the general rule. The provision that these things are goods when agreed to be severed "under the contract of sale" seems equivalent, as has been pointed out, to declaring that under a contract of sale they are to be deemed goods, whether the property is to pass before or after severance, and changes the law with regard to buildings sold as materials and *fructus naturales*. *Benj. Sales* (5th Eng. Ed.) 190.

recognized, the courts construe contracts for the sale of trees and other *fructus naturales*, even if the trees are to be cut by the purchaser, as executory contracts in which the title is not to pass until severance and conversion into personalty and by which the purchaser has until severance only a revocable license to enter and remove the trees.⁵⁶

From the character of *fructus industriales* as chattels, on the other hand, it follows that a sale of them is not within the fourth section.⁵⁷ But, though they are chattels,⁵⁸ it has been said to be an open question whether they are "goods, wares, and merchandises," and consequently within the seventeenth

⁵⁶ *White v. Foster*, 102 Mass. 375, 379, and Massachusetts cases cited in note 48, *supra*. *Usher, Sales*, § 96. The Massachusetts cases construe in this way contracts which in most jurisdictions would be construed as intended to pass title before severance, and as hence within the fourth section, but the peculiarity of the Massachusetts cases concerns rather the construction of the contract, and not the application of the statute. If the contract grants an estate in the trees while growing, the fourth section applies. *White v. Foster*, *supra*.

Where the contract limits the time within which the purchaser may remove the trees to a certain time, or by implication to a reasonable time, it is generally held that, if the time expires without removal, the rights of the purchaser in the timber, supposing there was an enforceable contract, are terminated. *Macomber v. Railroad Co.*, 108 Mich. 401, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713; *Bunch v. Lumber Co.*, 134 N. C. 118, 46 S. E. 24. *Contra*: *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821 (where there is no forfeiture clause in the contract). Cf. *Irons v. Webb*, 41 N. J. Law, 203, 32 Am. Rep. 193; *Kling v. Merriman*, 38 Minn. 47, 52, 35 N. W. 570.

⁵⁷ *Evans v. Roberts*, 5 Barn. & C. 836; *Jones v. Flint*, 10 Adol. & E. 753; *Warwick v. Bruce*, 2 Maule & S. 206; *Dunne v. Ferguson*, *Hayes*, 540; *Backenstoss v. Stahler*, 33 Pa. 251, 255, 75 Am. Dec. 592; *Marshall v. Ferguson*, 23 Cal. 66; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Vulcevlch v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Swafford v. Spratt*, 93 Mo. App. 631, 67 S. W. 701; *Wimp v. Early*, 104 Mo. App. 85, 78 S. W. 343.

⁵⁸ *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Newcomb v. Ramer*, 2 Johns. (N. Y.) 421, note a; *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Westbrook v. Eager*, 18 N. J. Law, 81; *Bricker v. Hughes*, 4 Ind. 146; *Bull v. Griswold*, 19 Ill. 631.

section,⁵⁰ but probably they are such.⁵¹ Whether fructus industriales include a crop which is neither annual nor permanent, but which affords a crop either the second or third year, or a succession of crops for several years, is a question on which there is little authority; but it would seem that the crop of the first year would be fructus industriales, and that the crops of subsequent years would be fructus naturales, unless, like hops, they require cultivation for each successive crop, in which case they would be fructus industriales till exhausted.⁵²

Fixtures.

Where chattels are attached to the freehold, as a rule, they become a part of the land, and are treated as such. Accordingly buildings upon the land pass with a conveyance of it, and an oral reservation of title to the building is inoperative.⁵³ And a contract to sell building material in a house to be removed by the buyer is a contract for the sale of an interest

⁵⁰ For dicta in the affirmative: *Evans v. Roberts*, 5 Barn. & C. 836, per Bayley, J., and *Littledale, J.*; *Marshall v. Green*, 1 C. P. Div. 35, 42, per Brett, J.; *Dunne v. Ferguson*, *Hayes*, 540, per Joy, C. B.; *Marshall v. Ferguson*, 23 Cal. 66, per Crocker, J.; *Sherry v. Picken*, 10 Ind. 375, per Perkins, J. See, also, *Ross v. Welch*, 11 Gray (Mass.) 235. Lord Blackburn says that the proposition is "exceedingly questionable." Blackb. Sales (2d Ed.) p. 13; *Benj. Sales*, § 127; *Langd. Cas. Sales*, 1031.

⁵¹ Under Sales Act, § 76 (1), emblements are goods, thus settling the doubt on this point.

⁵² *Benj. Sales*, §§ 128, 129, citing *Graves v. Weld*, 5 Barn. & Adol. 105. "A growing crop of peaches or other fruit, requiring periodical expense, industry, and attention, * * * may be well classed as fructus industriales." *Purner v. Piercy*, 40 Md. 212, 223, 17 Am. Rep. 591, per Stewart, J.

By Sales Act, § 76 (1), following the English Sale of Goods Act, "emblements" and "industrial growing crops" are declared to be goods. The latter term "would seem to include the first crop at any rate of vegetables sown or planted, although not maturing within 12 months—such as clover and teasels—and of artificial grass." *Benj. Sales* (5th Ed.) 189. It is said to be a Scotch term. *Chalmers, Sale of Goods Act* (6th Ed.) 124; *Benj. Sales* (5th Eng. Ed.) 173.

⁵³ *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305.

in land; ⁶³ but it seems that a contract to sell such materials, when they are to be removed from the land before the sale, is a contract to sell goods.⁶⁴

Where, however, chattels have been affixed to the freehold by a tenant and are subject to his right to remove them during the term, it has been held in England that a sale of them by the tenant to the landlord is not a sale of an interest in land within the fourth section, or of goods within the seventeenth; the real nature of the transaction being an abandonment of his right to sever them.⁶⁵ Whether a sale of fixtures by a tenant under such circumstances to a stranger would be a mere transfer of the tenant's right to sever them, or would be deemed, like a sale of emblements, to be a sale of chattels, and, if the latter whether it would be a sale of goods, seems to be an open question.⁶⁶ In this country a sale of removable fixtures by a tenant has been held not to be within the fourth section,⁶⁷ and it seems that a contract by the tenant to sell such fixtures, to be removed before the sale, would be a contract to sell goods within the seventeenth section.⁶⁸

⁶³ *Lavery v. Pursell*, 39 Ch. Div. 508. And see *Brown v. Roland*, 92 Tex. 54, 45 S. W. 795.

⁶⁴ *Bostwick v. Leach*, 3 Day (Conn.) 476; *Long v. White*, 42 Ohio St. 59; *Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949; *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771; ante, p. 74. But see *Meyers v. Schemp*, 67 Ill. 469.

In *Scales v. Wiley*, supra, it was held that a contract whereby plaintiff was to take down a barn on her premises, and, after the lumber had been drawn to defendant's premises, re-erect it there, was not a contract for the sale of an interest in land; but that it was not a contract to sell goods, but to make improvements on real estate.

⁶⁵ *Hallen v. Runder*, 1 Crompt. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. Div. 700, 45 Law J. Q. B. 540. And see *South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

⁶⁶ *Benj. Sales* (5 Eng. Ed.) 187.

⁶⁷ *Heysham v. Dettre*, 89 Pa. 506; *Powell v. McAshan*, 28 Mo. 70. "In the case of fixtures which are not incorporated with, but merely annexed to, the freehold, the rule is well settled that the statute does not apply." *Strong v. Doyle*, 110 Mass. 92, per Colt, J.

⁶⁸ Ante, p. 74.

Minerals—Ice.

Minerals, while in the earth, form part of the realty; but, when mined and severed therefrom, they become personalty.⁶⁹ Hence a contract for the sale of minerals which have been severed is a contract for the sale of chattels, and not of an interest in land.⁷⁰ By virtue of his ownership of the soil, ice which forms upon water overlying the land belongs to the owner of the land.⁷¹ It has been held, however, that ice should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.⁷²

**WHAT IS A CONTRACT FOR THE PRICE OR VALUE OF
£10 (\$50).**

23. The statute of frauds includes:

- (a) An entire contract for the sale of goods and for other objects not within the statute, where the value of the goods exceeds the statutory amount.
- (b) An entire contract for the sale of different goods, the joint value whereof exceeds the statutory amount.
- (c) A contract for the sale of goods of unascertained value at the date of the contract, the value whereof is afterwards ascertained to exceed the statutory amount.⁷³

The rule that an entire contract for the sale of goods, and for other matters not within the statute, is invalid, if the value of the goods exceeds the statutory amount, was established by *Harman v. Reeve*,⁷⁴ in which the plaintiff agreed to sell to the

⁶⁹ *Green v. Iron Co.*, 62 Pa. 97; *Kelley v. Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721.

⁷⁰ A contract between A. and B. to work a stone quarry and divide the profits, if A. can purchase the land and secure a deed to himself, is not for an interest in land. *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858.

⁷¹ *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 6 N. W. 636, 38 Am. Rep. 246; *Hoag v. Place*, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39.

⁷² *Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160.

⁷³ See *Kerr*, Dig. Sales, § 7.

⁷⁴ 18 C. B. 587, 25 Law J. C. P. 257. See, also, *Astey v. Emery*, 4 Maule & S. 262; *Cobbold v. Caston*, 1 Bing. 399, 8 Moore, 456.

defendant a mare and foal, which were above the value of £10, and also to agist them and another mare and foal for £30. The statute was held to apply, but the court said that the plaintiff might recover the value of the agistment. In the Massachusetts case of *Irvine v. Stone*,⁷⁵ however, in which a contract for the purchase of a cargo of coal at Philadelphia at an agreed price per ton, and for the payment of the freight, was held within the statute, the contract was held also to be unenforceable as to the freight.

The leading case upon the rule that an entire contract for the sale of various articles, neither of which is of the statutory value, but whose value in gross exceeds it, is within the statute, is *Baldey v. Parker*.⁷⁶ In this case the defendant bought at the plaintiff's shop a number of articles, each at a separate price less than £10, the whole amount being £70, and the case was decided upon the ground that the transaction constituted one entire contract. The cases in this country are in harmony with *Baldey v. Parker*,⁷⁷ and they even extend the rule to an auction, where the articles are struck off separately at distinct prices,⁷⁸ though in England in such a case a distinct contract arises for each lot.⁷⁹

The rule that the statute applies, although it be not ascertained till after the date of the contract that the value exceeds the statutory amount, was involved in *Watts v. Friend*,⁸⁰ where the sale was of a future crop of turnip seed at a guinea a bushel, and the value of the crop when produced exceeded £10. The

⁷⁵ 6 Cush. 508. See, also, *McMullen v. Riley*, 6 Gray (Mass.) 500.

⁷⁶ 2 Barn. & C. 37.

⁷⁷ *Gilman v. Hill*, 36 N. H. 318; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210; *Allard v. Greasert*, 61 N. Y. 1.

⁷⁸ *Mills v. Hunt*, 17 Wend. (N. Y.) 333; *Id.*, 20 Wend. (N. Y.) 431; *Coffman v. Hampton*, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; *Tompkins v. Haas*, 2 Pa. 74; *Kerr v. Shrader*, 1 Wkly. Notes Cas. (Pa.) 33; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48. But separate sales of real estate are distinct contracts. *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436, 7 Am. Dec. 330; *Robinson v. Green*, 3 Metc. (Mass.) 159; *Wells v. Day*, 124 Mass. 38.

⁷⁹ *Emmerson v. Heells*, 2 Taunt. 38. See, also, *Rugg v. Minett*, 11 East, 218, per Le Blanc, J.; *Roots v. Dormer*, 4 Barn. & Adol. 77; *Couston v. Chapman*, L. R. 2 H. L. Sc. 250.

⁸⁰ 10 Barn. & C. 446.

point was not argued or mentioned by the court, but the decision has been followed in the United States.⁸¹

ACCEPTANCE AND RECEIPT.

- 24.** In order to satisfy the exception, in case "the buyer shall accept part of the goods so sold, and actually receive the same," there must be both acceptance and actual receipt.
- 25.** Acceptance may precede, be contemporaneous with, or subsequent to, receipt, and both may be subsequent to the contract of sale.
- 26.** A sample constitutes a "part of the goods," if it be considered by the parties as part of the bulk sold.

Having considered the meaning of the words, "no contract for the sale of goods, wares, or merchandise for the price of £10 or upwards," it remains to consider under what circumstances such contracts "shall be allowed to be good." The section provides that they shall not be allowed to be good, "except (1) the buyer shall accept part of the goods so sold, and actually receive the same; (2) or give something in earnest to bind the bargain, or in part payment; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."⁸²

Acceptance and Receipt.

Referring to the first exception, Lord Blackburn says:⁸³ "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: The buyer must accept, and he must actually receive part of the goods, and the contract will not be good unless he does both; and this is to be borne in mind, for, as there may be an actual receipt without an acceptance, so there may be an accep-

⁸¹ *Carpenter v. Galloway*, 73 Ind. 418; *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402.

⁸² *Benj. Sales*, § 138 et seq.

⁸³ *Blackb. Sales*, 16.

tance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted, them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not. It may even be reasonable to try part of the goods by using them; but, though this is a very actual receipt, it is no acceptance, so long as the buyer can consistently object to the goods as not answering his order."

It is to be observed that the two questions of acceptance and receipt are frequently confused in the cases, and it has sometimes been questioned whether any distinction existed between them.⁸⁴ It is clearly established, however, that they are distinct, and that both acceptance and receipt are essential.⁸⁵

⁸⁴ *Castle v. Swarder*, 6 Hurl. & N. 832, 30 Law J. Exch. 810, per Crompton, J., and Cockburn, C. J.

⁸⁵ *Smith v. Hudson*, 6 Best & S. 431, 34 Law J. Q. B. 145; *Cusack v. Robinson*, 1 Best & S. 209, 30 Law J. Q. B. 261; *Bill v. Bament*, 9 Mees. & W. 36; *Baldey v. Parker*, 2 Barn. & C. 37; *Saunders v. Topp*, 4 Exch. 390; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Cooke v. Millard*, 65 N. Y. 352, 367, 22 Am. Rep. 619; *Maxwell*

Acceptance may precede receipt,⁸⁶ or receipt may precede acceptance,⁸⁷ and both may be subsequent to the contract of sale.⁸⁸ Their effect is to prove that there was a contract, the terms of which may then be proved by parol.⁸⁹

Acceptance and Receipt of Part—Sample.

As the statute requires an acceptance and receipt simply of a part, it is immaterial how small such part is.⁹⁰ Thus acceptance and receipt of a sample is sufficient, provided it be considered by the parties as part of the bulk sold.⁹¹ It is not sufficient if the sample be not so considered.⁹² So, also, accept-

v. Brown, 39 Me. 98, 63 Am. Dec. 605; Powder River Live Stock Co. v. Lamb, 88 Neb. 339, 56 N. W. 1019.

⁸⁶ Post, p. 85.

⁸⁷ Post, p. 87.

⁸⁸ Gault v. Brown, 48 N. H. 183, 188, 2 Am. Rep. 210; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Marsh v. Hyde, 3 Gray (Mass.) 331; Bush v. Holmes, 53 Me. 417; Field v. Runk, 22 N. J. Law, 525, 530; McCarthy v. Nash, 14 Minn. 127 (Gil. 95); Rickey v. Tenbroeck, 63 Mo. 563. Acceptance can have no effect after the seller has disaffirmed. Taylor v. Wakefield, 6 El. & Bl. 765. See Washington Ice Co. v. Webster, 62 Me. 341, 361, 16 Am. Rep. 462; Brand v. Focht, *42 N. Y. 409.

⁸⁹ Tomkinson v. Staight, 25 Law J. C. P. 85, 17 O. B. 697; Garfield v. Paris, 96 U. S. 557, 566, 24 L. Ed. 821; Coffin v. Bradbury, 3 Idaho (Hasb.) 770, 35 Pac. 715, 95 Am. St. Rep. 37.

⁹⁰ Garfield v. Paris, 96 U. S. 557, 24 L. Ed. 821 (labels deliverable under a contract for liquors as part of the goods sold); Damon v. Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229; Farmer v. Gray, 16 Neb. 401, 20 N. W. 276. A parol contract for the purchase of corporate stock owned in different portions by different persons, who individually consent to the sale, which is conducted by one of them, is the separate contract of each owner, so that a delivery of the stock of one does not prevent the operation, as to the contract of another, of the statute of frauds, which renders void parol contracts for the sale of goods above a certain price, unless there is an acceptance by the buyer, in whole or in part. Tompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502.

⁹¹ Hinde v. Whitehouse, 7 East, 558; Talver v. West, Holt, 178; Klinitz v. Surry, 5 Esp. 267; Gardner v. Grout, 2 C. B. (N. S.) 340; Brock v. Knower, 37 Hun (N. Y.) 609.

⁹² Cooper v. Elston, 7 Term R. 14; Simonds v. Fisher, cited in Gardner v. Grout, 2 C. B. (N. S.) 340; Moore v. Love, 57 Miss. 765; Dierson v. Petersmeyer, 109 Iowa, 233, 80 N. W. 389. See Carver v. Lane, 4 El. D. Smith (N. Y.) 168.

ance and receipt of a part is sufficient, though the rest of the goods are still unmade,⁸³ or though the contract embraces different kinds of goods, only one of which is accepted and received.⁸⁴

SAME—ACCEPTANCE.

27. Acceptance is an assent by the buyer that the goods are to be taken by him under and in performance of the contract of sale. Whether the buyer has accepted is a question of his intention, as evidenced by his words and acts. In England (but not in the United States) any dealing with the goods which recognizes a pre-existing contract of sale constitutes an acceptance.

28. If the contract be for the sale of specific goods, the acceptance takes place when the contract is entered into, and is proved by the same evidence which proves the contract.

29. CONSTRUCTIVE ACCEPTANCE. If the goods have been received by the buyer, any dealing with them by him as owner is evidence of acceptance.

Lord Blackburn adds at the close of the passage quoted on a preceding page that "on the whole the cases are pretty consistent with these suggestions and with each other, as to what forms an acceptance within the statute, though not as to the strength of the proof required to establish it."⁸⁵ The American cases also are pretty consistent with this statement of the law, but in England, as will be seen, an artificial construction has since the passage was written been put upon "acceptance," which is quite inconsistent with the views there expressed. The nature of an acceptance can best be understood by a consideration of the circumstances under which it is held to take place.

If the contract of sale is for specified goods, an acceptance ordinarily takes place when the contract is entered into.⁸⁶

⁸³ *Scott v. Railway Co.*, 12 Mees. & W. 33.

⁸⁴ *Elliott v. Thomas*, 8 Mees. & W. 170.

⁸⁵ *Blackb. Sales*, 17.

⁸⁶ *Cusack v. Robinson*, 1 Best & S. 299, 80 Law J. Q. B. 261; *Bog Lead Min. Co. v. Montague*, 10 C. B. (N. S.) 481, 489; *Cross v. O'Donnell*, 44 N. Y. 861, 4 Am. Rep. 721; *United States Reflector*

Thus in *Cusack v. Robinson*,⁸⁷ where the buyer was shown a lot of 156 firkins of butter and agreed to buy the lot, and the goods were forwarded to him, it was held that there was sufficient evidence to justify the jury in finding an acceptance. Blackburn, J., said: "There was sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific goods to be sent to London. This was certainly evidence of an acceptance." In such cases the acceptance of course precedes the receipt. Yet other cases hold or declare that, although the contract is one of sale of specific goods, an acceptance is not established merely by the words which indicate the buyer's assent to the sale, but that the acceptance, as well as the receipt, must be established by acts of the buyer over and above the words of the sale.⁸⁸ If the goods are ready for delivery, an acceptance will readily be implied, for example, from marking the goods with the name of the buyer by his consent,⁸⁹ although such marking would not constitute an actual receipt; but, if the goods are

Co. v. Rushton, 7 Daly (N. Y.) 410; *Vietor v. Stroock* (City Ct. N. Y.) 3 N. Y. Supp. 801; *Id.*, 5 Daly (N. Y.) 329, 5 N. Y. Supp. 650; *Simpson v. Krumdick*, 28 Minn. 352, 355, 10 N. W. 18. See, also, *Ex parte Safford*, 2 Low (U. S.) 563, 565, Fed. Cas. No. 12,212; *Knight v. Mann*, 118 Mass. 143, 145; *Hewes v. Jordan*, 39 Md. 472, 484, 17 Am. Rep. 578; *Langd. Cas. Sales*, 1021. "There may be a receipt without any acceptance, and an acceptance without any receipt. * * * An instance of acceptance without receipt is where the sale is of a specific lot of goods, where the bargain itself identifies the goods as so sold, and as of the quality which the buyer agrees to buy. In such case the buyer accepts when the bargain is made, though he may not receive the goods at that time." *Simpson v. Krumdick*, per Gliffillan, C. J.

⁸⁷ 1 Best & S. 299, 30 Law J. Q. B. 261.

⁸⁸ See *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903; *post*, p. 88 and cases cited in note 109. Cf. *Devine v. Warner*, 75 Conn. 375, 53 Atl. 782, 96 Am. St. Rep. 211; *Id.*, 76 Conn. 229, 56 Atl. 562.

The present English rule requires an act recognizing a pre-existent contract. *Post*, p. 89.

⁸⁹ *Bill v. Bament*, 9 Mees. & W. 36; *Hodgson v. Le Bret*, 1 Camp. 233; *Proctor v. Jones*, 2 Car. & P. 532, per Best, C. J.; *Saunders v. Topp*, 4 Exch. 390, per Alderson, B.; *Benj. Sales*, § 166, note y; *Rapley v. Adey*, 1 Thomp. & C. (N. Y.) 127.

not ready for delivery, an acceptance will not readily be implied.¹⁰⁰

If the contract of sale be for goods which are not specific when the contract is entered into, there can be no acceptance till the seller has indicated to the buyer what goods he proposes to deliver in performance of the contract,¹⁰¹ and it seems that the buyer is then entitled to a reasonable time to examine the goods before deciding whether to accept them,¹⁰² though he may doubtless waive his right of examination.¹⁰³ After the goods have been received by the buyer, his acceptance may be proved by any dealing with the goods on his part as owner,¹⁰⁴

¹⁰⁰ *Maberley v. Sheppard*, 10 Bing. 90; *Dauphiny v. Creamery Co.*, 123 Cal. 548, 56 Pac. 451.

¹⁰¹ *Langd. Cas. Sales*, 1021.

¹⁰² *Hunt v. Hecht*, 8 Exch. 814; *Nicholson v. Bower*, 1 El. & El. 172; *Smith v. Hudson*, 6 Best & S. 431, 34 Law J. Q. B. 145, per Cockburn, C. J.; *Langd. Cas. Sales*, 1021. In *Morton v. Tibbett*, post, Lord Campbell says: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." This view may be required by the artificial construction put on "acceptance" by Lord Campbell and the latest English decisions. But, where the term is construed in its natural sense, the right to examine before acceptance or rejection would seem to exist of necessity. See *Kent v. Huskinson*, 3 Bos. & P. 233.

¹⁰³ "It [acceptance] means some act done after the vendee has exercised, or had the means of exercising, his right of rejection." *Hunt v. Hecht*, 8 Exch. 814, 22 Law J. Exch. 293, per Martin, B. "According to Lord Campbell [*Morton v. Tibbett*, cited post], there may be an acceptance and receipt of goods by a purchaser within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. I agree with that. But in such case the party must have done something to waive his right to reject the goods." Per Bramwell, B., in *Coombs v. Railway Co.*, 3 Hurl. & N. 510, 27 Law J. Exch. 401. Of course, the buyer may waive the right to examine. *Currie v. Anderson*, 2 El. & El. 592.

¹⁰⁴ *Beaumont v. Brengerl*, 5 C. B. 801; *Parker v. Wallis*, 5 El. & Bl. 21; *Garfield v. Paris*, 96 U. S. 557, 563, 24 L. Ed. 821; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Gray v. Davis*, 10 N. Y. 285; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Ex parte Safford*, 2 Low. (U. S.) 563, Fed. Cas. No. 12,212; *Barkalow v. Pfeiffer*, 38 Ind. 214; *Bacon v.*

for example by a resale,¹⁰⁵ and even by his retaining them for such time as to lead to the presumption that he intended to keep them as owner.¹⁰⁶ And a dealing with the goods, such as to constitute an acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves.¹⁰⁷ An acceptance implied from the conduct of the buyer is called a constructive acceptance. Whether the acts or omissions of the buyer amount to a constructive acceptance is a question of fact for the jury, though the question is, of course, to be determined by the court, if the evidence is capable of only one construction.¹⁰⁸ It is sometimes said that an acceptance must be established by some act of the buyer, and that mere words are not enough, but the cases in which such statements occur generally involve simply the proposition that mere words are not enough to constitute acceptance and receipt,¹⁰⁹ and there is on principle no reason why the acceptance

Eccles, 43 Wis. 227, 238; *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. 472; *Wylar v. Rothschild*, 53 Neb. 568, 74 N. W. 41; *Leonard v. Medford*, 85 Md. 668, 37 Atl. 365, 37 L. R. A. 449.

¹⁰⁵ *Chaplin v. Rogers*, 1 East, 195; *Hill v. McDonald*, 17 Wis. 100; *Phillips v. Mills*, 55 Ga. 633; *Marshall v. Ferguson*, 23 Cal. 66.

¹⁰⁶ *Bushel v. Wheeler*, 15 Q. B. 442; *Coleman v. Gibson*, 1 Moody & R. 168; *Currie v. Anderson*, 2 El. & El. 592; *Farina v. Home*, 16 Mees. & W. 119; *Borrowdale v. Bosworth*, 99 Mass. 379; *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Downs v. Marsh*, 29 Conn. 409; *Gaff v. Homeyer*, 59 Mo. 345; *Hobbs v. Whip Co.*, 158 Mass. 194, 33 N. E. 495.

¹⁰⁷ *Currie v. Anderson*, 2 El. & El. 592, 29 Law J. Q. B. 87; *Meredith v. Melgh*, 2 El. & Bl. 364, 22 Law J. Q. B. 401. See *Quintard v. Bacon*, 99 Mass. 185; *Rodgers v. Phillips*, 40 N. Y. 519.

¹⁰⁸ *Edan v. Dudfield*, 1 Q. B. 302, per Denman, C. J.; *Bushel v. Wheeler*, 15 Q. B. 442, per Coleman and Williams, JJ.; *Garfield v. Paris*, 96 U. S. 557, 563, 24 L. Ed. 821; *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; *Stone v. Browning*, 68 N. Y. 598; *Shepherd v. Pressey*, 32 N. H. 49, 57; *Corbett v. Wolford*, 84 Md. 428, 35 Atl. 1088.

¹⁰⁹ *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Bailey v. Ogden*, 3 Johns. (N. Y.) 421, 3 Am. Dec. 509; *Kellogg v. Witherhead*, 6 Thomp. & C. (N. Y.) 525; *Dole v. Stimpson*, 21 Pick. (Mass.) 384; *Edwards v. Railway Co.*, 54 Me. 105; *Kirby v. Johnson*, 22 Mo. 354; *Northrup v. Cook*, 39 Mo. 208; *Clark v. Labreche*, 63 N. H. 397; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903.

may not be evidenced by the buyer's declarations.¹¹⁰ The receipt of goods by a carrier or wharfinger appointed by the buyer does not constitute an acceptance. These agents have authority to receive, but not to accept.¹¹¹

Whether Acceptance must be in Performance of the Contract—In England.

Beginning with the case of *Morton v. Tibbett*,¹¹² a different construction began in England to be placed on "acceptance," and it has become established that the acceptance need not be in performance of the contract, but that any dealing with the goods which recognizes a pre-existing contract of sale constitutes an acceptance.¹¹³ In *Morton v. Tibbett*, the defendant had made a verbal agreement with the plaintiff for the purchase of 50 quarters of wheat according to sample, each quarter to be of a specified weight, and the wheat was received on the defendant's lighter for conveyance to its destination, where it duly arrived, but in the meantime the defendant resold it on the same understanding as to weight. The wheat on arrival was rejected by the second purchaser for short weight, and was thereupon rejected by the defendant on the same ground. It

¹¹⁰ *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Shepherd v. Pressey*, 32 N. H. 49, 58; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Galvin v. MacKenzie*, 21 Or. 184, 27 Pac. 1039. See *Stone v. Browning*, 68 N. Y. 598. Acceptance is evidenced by mere words, where the contract is for specific goods, ante, p. 85.

¹¹¹ *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Norman v. Phillips*, 14 Mees. & W. 276; *Hunt v. Hecht*, 8 Exch. 814; *Meredith v. Meigh*, 2 El. & Bl. 370, 22 Law J. Q. B. 401, overruling *Hart v. Sattley*, 3 Camp. 528; *Frostburg Min. Co. v. Glass Co.*, 9 Cush. (Mass.) 115; *Allard v. Greasert*, 61 N. Y. 1, 5; *Jones v. Bank*, 29 Md. 287, 96 Am. Dec. 533; *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Kelwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Billin v. Henkel*, 9 Colo. 394, 13 Pac. 420; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; *Hudson Furniture Co. v. Carpet Co.*, 10 Utah, 31, 36 Pac. 132; *Walte v. McKelvy*, 71 Minn. 167, 73 N. W. 727; *Salomon v. King*, 63 N. J. Law, 39, 42 Atl. 745; *Gatiss v. Cyr*, 134 Mich. 233, 96 N. W. 26. Cf. *Leggett & Meyer Tobacco Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417. Contra: *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Strong v. Dodds*, 47 Vt. 348. Cf. *Agnew v. Dumas*, 64 Vt. 147, 23 Atl. 634.

¹¹² 15 Q. B. 428, 19 Law J. Q. B. 382.

¹¹³ *Kerr*, Dig. Sales, § 10.

was held that the defendant had accepted, and Lord Campbell, after observing that it would be open to the buyer, after acceptance of a part, "to object at all events to the quantity and quality of the residue," announced: "We are of the opinion that * * * there may be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords exclusive evidence of the contract having been fulfilled. We are therefore of the opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." It would seem that the resale before examination was such an act of ownership as was inconsistent with the continuance of the right of property in the seller, that the defendant had thereby waived his right to reject the wheat, and that his conduct was sufficient evidence of an acceptance.¹¹⁴ But the construction announced by Lord Campbell, that acceptance does not preclude rejection, has, after some dissent,¹¹⁵ prevailed, and was adopted by the court of appeals in the recent case of *Page v. Morgan*,¹¹⁶ in which the natural meaning of "accept" is entirely abandoned. There the buyer examined the goods simply to see if they agreed with the

¹¹⁴ *Benj. Sales*, § 150.

¹¹⁵ *Hunt v. Hecht*, 8 Exch. 814, 22 Law J. Exch. 293; *Coombs v. Bristol & E. Ry. Co.*, 3 Hurl. & N. 510, 27 Law J. Exch. 401. See, also, *Smith v. Hudson*, 6 Best & S. 431, 34 Law J. Q. B. 145; *Castle v. Sworder*, 6 Hurl. & N. 832, 30 Law J. Exch. 310, per Cockburn, C. J.

¹¹⁶ 15 Q. B. Div. 228. See, also, *Cusack v. Robinson*, 1 Best & S. 290, 30 Law J. Q. B. 261, per Blackburn, J.; *Currie v. Anderson*, 2 El. & El. 592, 29 Law J. Q. B. 87, per Crompton, J.; *Kibble v. Gough*, 38 Law T. (N. S.) 204; *Rickard v. Moore*, Id. 841. But where the buyer inspected the goods at the carrier's wharf on arrival, and wrote across the note of advice, "Refused, not according to representation," and 10 days later notified his refusal to the seller, it was held no acceptance and *Page v. Morgan*, 15 Q. B. Div. 228, was distinguished. *Taylor v. Smith* [1893] 2 Q. B. 65.

sample, and rejected them as not equal to sample, and it was held that this constituted an acceptance. Brett, M. R., in giving judgment, said: "All that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and the goods were sent to fulfill that contract." "I rely * * * on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods, involving an admission that there was a contract."

Same—In the United States.

In the United States, however, the later artificial construction of the English courts has never been adopted, and it is clearly established, in accordance with the statement of the law made by Lord Blackburn,¹¹⁷ and with the earlier English cases,¹¹⁸ that the acceptance must be in performance of the contract; that is, "there must be an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract."¹¹⁹

"There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not." Sale of Goods Act, § 4 (3). See *Abbott v. Wolsey* (1895) 2 Q. B. 97; *Taylor v. Great Eastern Ry.* (1901) 1 K. B. 774.

¹¹⁷ Ante, p. 82.

¹¹⁸ *Howe v. Palmer*, 3 Barn. & Ald. 321; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Phillips v. Bistolli*, 2 Barn. & C. 511; *Smith v. Surnam*, 9 Barn. & C. 561; *Acebal v. Levy*, 10 Bing. 376; *Norman v. Phillips*, 14 Mees. & W. 277.

¹¹⁹ *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 401; *Stone v. Browning*, 51 N. Y. 211, 68 N. Y. 598; *Cooke v. Millard*, 65 N. Y. 352, 370, 22 Am. Rep. 619; *Knight v. Mann*, 118 Mass. 143; *Id.*, 120 Mass. 219; *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907; *Shepherd v. Pressey*, 32 N. H. 49; *Gorham v. Fisher*, 30 Vt. 428; *Smith v. Fisher*, 59 Vt. 53, 7 Atl. 816; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Bacon v. Eccles*, 43 Wis. 227; *Scotten v. Sutter*, 37 Mich. 526; *Simpson v. Krumdick*, 28 Minn. 352, 354, 10 N. W. 18; *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Garfield v. Paris*, 96 U. S. 567, 24 L. Ed. 821; *Meyer v. Thompson*, 16 Or. 194, 18 Pac. 16; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Hershey Lumber Co. v. Lumber Co.*, 66 Minn. 449, 69 N. W. 215; *Dinnle v. Johnson*, 8 N. D. 153, 77 N.

As was observed in *Phillips v. Bistolli*,¹²⁰ in a passage frequently quoted in the American cases: "There must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner." And in the leading case of *Caulkins v. Hellman, Rapallo, J.*, said: "Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required."¹²¹ This view is not inconsistent with the statement of Lord Campbell in *Morton v. Tibbett* that it would be open to the buyer, after acceptance of a part, to object to the quantity or quality of the residue,—a principle which is fully recognized by the American cases.¹²² It is enough if the part received is accepted as a partial fulfillment of the con-

W. 612; *Dlerson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389. Cf. *Devine v. Warner*, 75 Conn. 375, 53 Atl. 782, 96 Am. St. Rep. 211; *Id.*, 76 Conn. 229, 56 Atl. 562; *Mechanical Boller-Cleaner Co. v. Kellner*, 62 N. J. Law, 544, 43 Atl. 599.

Where two shipments of goods were received by the defendant, and he wrote to the plaintiffs complaining of the quality, and stating that he would look them over again, and, if they were not all right, would return them, and he did return them two weeks later on the ground that he could "do better," there was evidence from which the jury might infer an acceptance and receipt. *Standard Wall Paper Co. v. Towns*, 72 N. H. 324, 53 Atl. 744. "From this evidence," said the court, "It might be inferred that the plaintiff examined the goods with the intention of accepting them if they corresponded with the sample, and that they were accepted by him, as they did in fact so correspond, but were subsequently returned because, in the language of his letter, he found he could 'do better.' Whether this inference should be drawn is a question of fact, as is also the question what inference should be made from the length of time the goods were kept before they were returned." See *Sales Act*, § 4 (3).

¹²⁰ 2 Barn. & C. 511.

¹²¹ 47 N. Y. 449, 7 Am. Rep. 461.

¹²² *Garfield v. Paris*, 96 U. S. 557, 562, 24 L. Ed. 821; *Hewes v. Jordan*, 39 Md. 472, 483, 17 Am. Rep. 578. In *Remick v. Sandford*, 120 Mass. 309, 316, it is said by Devens, J., that "If the buyer accepts the goods as those which he purchased he may afterwards reject them if they are not what they were warranted to be, but the statute is satisfied." See post, p. 369.

tract. It must, however, distinctly appear that the goods were accepted under the contract.¹²³ This was strongly illustrated in *Atherton v. Newhall*,¹²⁴ where a small part of the goods was delivered by an expressman, and the buyer, having learned that the rest of the goods had been destroyed by fire, at once notified the seller that he would pay only for the part received. It was held that there was no acceptance. Gray, C. J., said: "The acceptance by the buyer of the part brought by the expressman was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with the intention to perform the whole contract, and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received."

SAME—ACTUAL RECEIPT.

30. Actual receipt is the taking possession of the goods by the buyer with the seller's consent. It implies such a transfer of possession as to divest the seller's lien, and may be effected:

- (a) By the actual delivery of the goods by the seller to the buyer or to his agent; or
- (b) By agreement.

31. BY AGREEMENT. An actual receipt takes place by agreement:

- (a) When the goods are in the actual possession of the seller, if he becomes bailee of the goods for the buyer.
- (b) When the goods are in the custody of a third person as bailee of the seller, if such third person, with the consent of the seller, becomes bailee of the buyer.
- (c) When the goods are in the custody of the buyer, as bailee of the seller, if with the consent of the seller he ceases to hold them as bailee, and holds them as owner.

¹²³ *Davis v. Eastman*, 1 Allen (Mass.) 422; *Townsend v. Hargraves*, 118 Mass. 325; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Van Woert v. Railroad Co.*, 67 N. Y. 538; *Matthiessen & Welchers Refining Co. v. McMahon's Adm'r*, 88 N. J. Law, 538.

¹²⁴ 123 Mass. 141, 25 Am. Rep. 47.

Where acceptance is shown, a very liberal construction is placed on actual receipt.¹²⁵ The simplest way in which a transfer of possession may be effected is by the removal of the goods by the buyer or his agent.¹²⁶ Receipt, however, implies delivery,¹²⁷ and the receipt must be with the seller's consent, and with the intention on his part of transferring possession to the buyer as owner. The test for determining whether there has been such a transfer of possession is whether the seller has parted with his lien.¹²⁸ If the goods are to be forwarded to the buyer, the time when the possession is transferred depends on the character of the person by whom the goods are carried. If they are carried by the seller's servant or agent, there is, of course, no transfer of possession so long as they remain in his hands.¹²⁹ If they are forwarded by a carrier designated by the buyer, an actual receipt takes place when they are delivered to him for carriage.¹³⁰ And, where goods are forwarded by a common carrier, the carrier is, in the absence of special agreement, regarded as the agent of the buyer, and the result is the same as if the carrier were specially designated by him.¹³¹ The seller may, however, reserve the right of possession notwithstanding the delivery of the goods to the carrier, and in such a

¹²⁵ Chalm. Sale of Goods (6th Ed.) 159.

¹²⁶ Blackb. Sales, 25; Benj. Sales, § 180; *Rodgers v. Jones*, 129 Mass. 420, 422.

¹²⁷ *Saunders v. Topp*, 4 Exch. 390, per Parke, B.

¹²⁸ *Phillips v. Bistolli*, 2 Barn. & C. 511; *Baldey v. Parker*, Id. 37, per Holroyd, J.; *Bill v. Bament*, 9 Mees. & W. 37; *Ousack v. Robinson*, 30 Law J. Q. B. 264, 1 Best & S. 299; *Castle v. Sworder*, 20 Law J. Exch. 235, 30 Law J. Exch. 310, 6 Hurl. & N. 832; *Safford v. McDonough*, 120 Mass. 290; *Rodgers v. Jones*, 129 Mass. 420; Ex parte *Safford*, 2 Low. (U. S.) 563, Fed. Cas. No. 12,212; *Green v. Merriam*, 28 Vt. 801; *Marsh v. Rouse*, 44 N. Y. 643; *Stone v. Browning*, 51 N. Y. 211; *Maxwell v. Brown*, 39 Me. 98, 103, 63 Am. Dec. 606; *Gardet v. Belknap*, 1 Cal. 399; *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; post, p. 317.

¹²⁹ *Grey v. Cary*, 9 Daly, (N. Y.) 363; *Agnew v. Dumas*, 64 Vt. 147, 23 Atl. 634.

¹³⁰ *Bullock v. Tschergl*, 4 McCrary (U. S.) 184, 13 Fed. 345; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. See, also, cases cited ante, p. 89, note 111, and post, p. 290.

¹³¹ Post, p. 290.

case delivery to the carrier does not constitute an actual receipt.¹⁸²

Actual Receipt by Agreement.

The possession of the goods may, however, be transferred and an actual receipt take place, by agreement, without the physical delivery of the goods.

Same—When Goods are in Possession of Seller.

If the goods are in the possession of the seller at the time of the contract, an actual receipt takes place if the parties agree that the seller shall cease to hold as owner, and shall assume the character of bailee or agent of the buyer in respect to the custody of the goods, the possession of the seller being by the agreement converted into the possession of the buyer.¹⁸³ A leading case on this point is *Elmore v. Stone*,¹⁸⁴ where the buyer of horses left them with the seller at livery. It was held that as soon as the seller consented to keep them at livery his possession was changed, and that from that time he held, not as owner, but as any other liveryman might do. But an agreement to hold in this changed character will not readily be presumed, and it must distinctly appear that the seller has consented to abandon his lien.¹⁸⁵ Some cases even hold that a mere agreement that the seller shall hold as bailee is not enough, and that some act is necessary to establish the changed character of the ownership;¹⁸⁶ but on principle it would seem

¹⁸² Post, p. 162.

¹⁸³ *Elmore v. Stone*, 1 Taunt. 458; *Beaumont v. Brengerl*, 5 C. B. 301; *Marvin v. Wallis*, 6 El. & Bl. 726, 25 Law J. Q. B. 309; *Castle v. Swarder*, 29 Law J. Exch. 235, 30 Law J. Exch. 810, 6 Hurl. & N. 832; *Cusack v. Robinson*, 1 Best & S. 209, per Blackburn, J. *Green v. Merriam*, 28 Vt. 801; *Means v. Williamson*, 37 Me. 556; *Ex parte Safford*, 2 Low. (U. S.) 563, Fed. Cas. No. 12,212; *Janvrin v. Maxwell*, 23 Wis. 51; *Rodgers v. Jones*, 129 Mass. 420, 422; *Safford v. McDonough*, 120 Mass. 290, 291; *Webster v. Anderson*, 42 Mich. 554, 4 N. W. 288, 36 Am. Rep. 452; *Devine v. Warner*, 75 Conn. 375, 53 Atl. 782, 96 Am. St. Rep. 211; *Id.*, 76 Conn. 229, 56 Atl. 562; post, p. 271.

¹⁸⁴ 1 Taunt. 458.

¹⁸⁵ *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Carter v. Tous-saint*, 5 Barn. & Ald. 855; *Holmes v. Hoskins*, 9 Exch. 753. See *Blackb. Sales*, 26; post, p. 271.

¹⁸⁶ *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J.

that the only question is whether the agreement is distinctly established.¹⁸⁷

Same—When Goods are in Possession of Third Person.

If the goods at the time of the contract are in the custody of a third person as bailee, an actual receipt takes place when the buyer, the seller, and the bailee agree that the latter shall cease to hold for the seller, and shall hold for the buyer, or, as is sometimes said, when the bailee, with the seller's consent, attorns to the buyer.¹⁸⁸ The possession of the agent being, in contemplation of law, the possession of the principal, a transfer of possession is thus effected by simply constituting the custodian the agent of the buyer. The consent of all parties is, of course, essential, and therefore an order from the seller to a warehouseman, wharfinger, carrier, or other bailee to deliver the goods to the buyer will be inoperative to transfer the possession, unless the bailee attorns.¹⁸⁹

Law, 536; Kirby v. Johnson, 22 Mo. 354; Bowers v. Anderson, 49 Ga. 143; Malone v. Plato, 22 Cal. 103. It is said in Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, and some other cases (ante, p. 88), that mere words cannot constitute acceptance and receipt, and that superadded to the language of the contract there must be some acts of the parties amounting to a change of possession. See, also, Bailey v. Ogden, 3 Johns. (N. Y.) 390; Ely v. Ormsby, 12 Barb. (N. Y.) 570; Hallenbeck v. Cochran, 20 Hun (N. Y.) 416; Gorman v. Brossard, 120 Mich. 611, 79 N. W. 903. In those cases there was nothing to show a change of possession from that of owner to that of bailee. But in Rappleye v. Adeo, 65 Barb. (N. Y.) 589, where the sheep sold were separated from the rest of the seller's flock, the buyer's mark put upon them, and the parties agreed to let them run with the seller's sheep for a few days, it was held that the evidence warranted the jury in finding delivery and acceptance, and that the rule of Shindler v. Houston was properly applied. See, also, Wylie v. Kelly, 41 Barb. (N. Y.) 594.

¹⁸⁷ Benj. Sales, § 182.

¹⁸⁸ Bentall v. Burn, 3 Barn. & C. 423; Farina v. Home, 16 Mees. & W. 119; Simmonds v. Humble, 13 C. B. (N. S.) 258; Townsend v. Hargraves, 118 Mass. 325, 332; Bassett v. Camp, 54 Vt. 232; post, p. 319. See St. Paul & Minneapolis Trust Co. v. Howell, 59 Minn. 295, 61 N. W. 141.

¹⁸⁹ Cases cited in note 138, supra. But where the goods were in a United States bonded warehouse, and the duties were unpaid, it was held that an attornment by the warehouseman could have no effect to change the possession, since the goods were in possession of the

If, however, the goods are on the premises of a third person, who is not bailee, as timber lying at the disposal of the seller on land of a person from whom he bought it, or at a public wharf, "delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them."¹⁴⁰

Same—When Goods are in Possession of Buyer.

If the goods, at the time of the contract, are already in the possession of the buyer, an actual receipt takes place when the parties agree that the latter shall cease to hold them as bailee, and shall hold them as owner.¹⁴¹ Thus, in *Lillywhite v. Devereux*,¹⁴² it is said that if the buyer, under such circumstances, deals with the goods in a manner inconsistent with the supposition that his former possession remains unchanged, he may be said to have accepted and actually received them; the court apparently taking the view that the consent of the seller to the transfer of possession was given by entering into the contract, and that the same acts on the part of the seller which were evidence of an acceptance were also evidence that he had begun to hold in the character of owner.

United States, and the warehouseman was not the bailee of the seller. In *re Clifford*, 2 Sawy. (U. S.) 428, Fed. Cas. No. 2,893.

Where plaintiff purchased by verbal contract the seller's undivided half interest in a machine which was in the possession of defendant, who was the owner of the other half, the statute was not satisfied, there being no evidence of acceptance and receipt. *Gerndt v. Conradt*, 117 Wis. 15, 93 N. W. 804.

¹⁴⁰ *Benj. Sales*, § 178. See *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 Hurl. & C. 722; *Marshall v. Green*, 1 C. P. Div. 35, per Grove, J.; *Leonard v. Davis*, 1 Black. (U. S.) 476, 17 L. Ed. 222; *Thompson v. Railroad Co.*, 28 Md. 306; *Brewster v. Leith*, 1 Minn. 56 (Gil. 40). Cf. *Langd. Cas. Sales*, 1023. So of logs floating in the river. *Post*, p. 274. But see *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903.

¹⁴¹ *Edan v. Duffield*, 1 Q. B. 806; *Lillywhite v. Devereux*, 15 Mees. & W. 285; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814; *Langd. Cas. Sales*, 1023; *Benj. Sales*, § 173. Contra: *Follett Wool Co. v. Deposit Co.*, 84 App. Div. 151, 82 N. Y. Supp. 597. Cf. *Markham v. Jaudon*, 41 N. Y. 235, 242; *Brown v. Warren*, 43 N. H. 430; *Dorsey v. Pike*, 50 Hun (N. Y.) 534, 3 N. Y. Supp. 730. *Post*, p. 318.

¹⁴² 15 Mees. & W. 285.

EARNEST OR PART PAYMENT.

32. Earnest is something of value, not forming part of the price given, and received to mark the final assent of the parties to the bargain.
33. Part payment may be made at or subsequently to the time of the contract of sale, either in money or anything of value, or by the actual extinguishment of an existing indebtedness by means of an agreement independent of the contract of sale.

Earnest.

The giving of earnest was formerly a prevalent custom in England, but it has fallen so much into disuse that the provision in respect to it is of little practical importance. Earnest may be money or some gift or token given¹⁴³ by the buyer to the seller to mark the final assent of both to the bargain.¹⁴⁴ It follows that earnest and part payment are distinct.¹⁴⁵ In a Massachusetts case,¹⁴⁶ however, it was said that earnest is regarded as part payment of the price,—a dictum which was hardly necessary to support the decision that money deposited with a third person by the parties, to be paid to either as a forfeiture if the other should neglect to fulfill his part of the contract, was not given in earnest. The thing must have some value, and on this ground a note given by the buyer for the price, and void for want of consideration, could not be regarded as given in earnest.¹⁴⁷

Part Payment.

The part payment, like the acceptance and receipt, may be subsequent to the contract of sale,¹⁴⁸ unless, as in some states,

¹⁴³ Where the buyer drew a shilling across the seller's hand, which was called "striking a bargain," but kept the coin, the statute was not satisfied. *Blenkinsop v. Clayton*, 7 Taunt. 597.

¹⁴⁴ *Brac.* 1, 2, c. 27.

¹⁴⁵ *Benj. Sales*, § 189; *Kerr, Dig. Sale*, § 16; *Howe v. Smith*, 27 Ch. Div. 89, 101, per Fry, L. J.

¹⁴⁶ *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306. See, also, *Noakes v. Morey*, 30 Ind. 103.

¹⁴⁷ *Krohn v. Bantz*, 68 Ind. 277.

¹⁴⁸ *Walker v. Nussey*, 16 Mees. & W. 302, per Parke, B.; *Thomp-*

the statute expressly provides that it must be at the time of the contract.¹⁴⁹ The payment must, of course, be accepted.¹⁵⁰

Payment need not be in money, but may be by means of anything of value which by mutual agreement is given by the buyer, and accepted by the seller, on account or in part satisfaction of the price.¹⁵¹ Thus it would seem that the transfer of a bill or note would suffice;¹⁵² and, under the New York statute requiring payment at the time, the delivery of a check, which was duly paid, has been held sufficient.¹⁵³ But the delivery of the buyer's note does not operate as payment.¹⁵⁴ Nor does a mere agreement, forming part of the contract of sale, to set off or apply in payment a debt due to the buyer constitute payment.¹⁵⁵ Such an agreement, to be effective, must be by independent contract,¹⁵⁶ and many cases even hold that mere words are not sufficient, and that some act, such as the surrender or cancellation of the evidence of the indebtedness, or a receipt, is requisite.¹⁵⁷ But, on principle, any independent verbal agreement,

son v. Alger, 12 Metc. (Mass.) 428, 435; Marsh v. Hyde, 3 Gray (Mass.) 331.

¹⁴⁹ Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; Id., 84 N. Y. 549, 38 Am. Rep. 544; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65; Bates v. Chesebro, 32 Wis. 594; Kerkhof v. Paper Co., 68 Wis. 674, 32 N. W. 706; Crosby Hardwood Co. v. Trester, 90 Wis. 412, 63 N. W. 1057.

¹⁵⁰ Edgerton v. Hodge, 41 Vt. 676; Hershey Lumber Co. v. Lumber Co., 66 Minn. 449, 69 N. W. 215.

¹⁵¹ White v. Drew, 56 How. Prac. 53; Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832 (surrender of note of seller held by buyer); Welr v. Hudnut, 115 Ind. 525, 18 N. E. 24; Burton v. Gage, 85 Minn. 355, 88 N. W. 997; Benj. Sales, § 194.

¹⁵² Chamberlyn v. Delarive, 2 Wils. 353; Kearslake v. Morgan, 5 Term R. 513; Griffiths v. Owen, 13 Mees. & W. 58.

¹⁵³ Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

¹⁵⁴ Krohn v. Bantz, 68 Ind. 277; Combs v. Bateman, 10 Barb. (N. Y.) 573; Hooker v. Knab, 26 Wis. 511.

¹⁵⁵ Walker v. Nussey, 16 Mees. & W. 302; Artcher v. Zeh, 5 Hill (N. Y.) 200; Mattice v. Allen, 42 N. Y. 493; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6; Matthlessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575; Norton v. Davison (1899) 1 Q. B. 401.

¹⁵⁶ Walker v. Nussey, 16 Mees. & W. 302, per Parke, B.; Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

¹⁵⁷ See Artcher v. Zeh, Mattice v. Allen, Pitney v. Glen's Falls

whereby the indebtedness is extinguished, would seem to be sufficient.¹⁵⁸

THE NOTE OR MEMORANDUM.

34. The note or memorandum must state:

- (a) The names or descriptions of the parties in their respective capacities as seller and buyer.
- (b) The price, if agreed on.
- (c) The goods sold.
- (d) Any other material terms of the contract, except that it need not state the consideration of the promise of the party to be charged.

35. The note or memorandum may be made at any time before action brought, and may be written on separate papers, provided they are all signed by the party to be charged or his agent, or that such as are not so signed are attached to or referred to in a signed paper.

36. The note or memorandum need not be delivered to the party seeking to enforce the contract; it is sufficient if it admits the contract.

Difference between Contract in Writing and Note or Memorandum.

At common law, the parties to a contract may reduce it to writing, or may agree upon some existing writing as containing the terms of contract, and when they do so they are bound by the terms of the written contract, and are not allowed to offer proof of different or additional terms. The same rule applies to a writing which they agree upon as containing part of the terms of the contract; for example, the specifications of an article to be manufactured. In all such cases the contract, so far as it is reduced to writing, cannot, in general, be proved by any other means than by the writing. This result takes place,

Ins. Co., Matthiessen & W. Refining Co. v. McMahon's Adm'r, cited in note 155; *Brabin v. Hyde*, 32 N. Y. 519; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903.

¹⁵⁸ *Dow v. Worthen*, 37 Vt. 108. An agreement that the buyer shall pay a debt due by the seller to a third person assented to by the latter. *Cotterill v. Stevens*, 10 Wis. 422; *Langd. Cas. Sales*, 1087.

of course, only when the writing is by the consent of both parties agreed upon as containing their contract, in whole or in part.¹⁵⁰ The statute of frauds leaves the common-law rule in respect to contracts in writing as it was before. If the contract be in writing, the writing must be proved as containing the only legal evidence of the terms of the contract, even though the statute has been satisfied by acceptance and receipt, or by earnest or part payment, and although, for lack of the signature of the party to be charged, the writing would not be sufficient as a statutory note or memorandum.¹⁵¹ The note or memorandum differs from a contract in writing, in that under the statute any writing which contains the terms of the contract is sufficient, if it be signed by the party to be charged. A contract in writing, indeed, if signed by the party to be charged, will satisfy the statute, but a mere admission in writing of an antecedent oral contract is sufficient.¹⁵² In other words, the statute may be satisfied in writing in two ways: By putting the contract in writing, or by furnishing evidence in writing of an oral contract.¹⁵³ A mere note or memorandum, however, unlike a contract in writing, need not be introduced in evidence at all, if the contract can be brought within the first or second exceptions, though in such a case it may still be introduced as an admission of the terms of the contract, of which it would be strong, though not conclusive, evidence.¹⁵⁴

Note or Memorandum in the Nature of an Admission.

The note or memorandum is in the nature of an admission of the contract by the party to be charged. Thus it may be in the form of a letter, and it is immaterial to whom the letter is addressed—whether to a third person¹⁵⁴ or to the writer's own

¹⁵⁰ Blackb. Sales, 40-42; Benj. Sales, §§ 201-206.

¹⁵¹ *Sleewright v. Archibald*, 17 Q. B. 103, per Erle, J.

¹⁵² *Sleewright v. Archibald*, 17 Q. B. 103, per Patteson, J.; *Saunders v. Jackson*, 2 Bos. & P. 238, per Lord Eldon; *Parton v. Crofts*, 33 Law J. C. P. 189, per Erle, C. J.; *Balley v. Sweeting*, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150; *Lerned v. Wannemacher*, 9 Allen (Mass.) 412, 416; *Townsend v. Hargraves*, 118 Mass. 325, 334; *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571.

¹⁵³ Langd. Cas. Sales, 1032.

¹⁵⁴ Blackb. Sales, 42.

¹⁵⁵ *Penbody v. Speyers*, 56 N. Y. 230; *Moore v. Mountcastle*, 61 Mo. 424.

agent.¹⁶⁵ It has been held that the memorandum is sufficient though never delivered;¹⁶⁶ for example, if it be in the form of a resolution of a corporation sought to be charged.¹⁶⁷ It is even sufficient if it is in the form of a letter repudiating,¹⁶⁸ but not denying, the existence of the contract.¹⁶⁹ It is enough if the memorandum be in existence at the time the action is brought.¹⁷⁰ But the memorandum cannot be regarded as being nothing more than evidence of the contract, since it is held that its existence, unless the statute be otherwise satisfied, is a condition precedent to the right of action.¹⁷¹

What the Note or Memorandum must Contain—Names of Parties.

The statute itself expressly provides that the name of the party to be charged must be signed, and it has been settled by

¹⁶⁵ Gibson v. Holland, L. R. 1 C. P. 1, 35 Law J. C. P. 5; Kleeman v. Collins, 9 Bush (Ky.) 460, 467; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800. Contra: Steel v. Fife, 48 Iowa, 99, 30 Am. Rep. 388. See Browne, St. Frauds, § 354a.

¹⁶⁶ Drury v. Young, 58 Md. 546, 42 Am. Rep. 343. But see Parker v. Parker, 1 Gray (Mass.) 409; Browne, St. Frauds, § 354.

A signed, but undelivered, lease may be given in evidence to prove an agreement upon the details of a lease pursuant to one of the terms of a previously signed memorandum in writing of an oral agreement for a lease; and if said previous memorandum of agreement for a lease and the signed, but undelivered, lease, taken together, show a completed agreement upon the terms of a lease, the statute of frauds is satisfied, and specific performance may be decreed. Charlton v. Columbia Real Estate Co., 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. Rep. 495.

¹⁶⁷ Johnson v. Society, 11 Allen (Mass.) 123; Tufts v. Mining Co., 14 Allen (Mass.) 407; Argus Co. v. City of Albany, 55 N. Y. 495, 14 Am. Rep. 296.

¹⁶⁸ Bailey v. Sweeting, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150; Wilkinson v. Evans, L. R. 1 C. P., at page 411; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343.

¹⁶⁹ Bacon v. Eccles, 43 Wis. 227.

¹⁷⁰ See cases cited in next note.

¹⁷¹ Bill v. Bament, 9 Mees. & W. 36. See, also, Gibson v. Holland, L. R. 1 C. P. 1, 35 Law J. C. P. 5, per Willes, J.; Lucas v. Dixon, 22 Q. B. Div. 357; Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571; Phillips v. Mills, 55 Ga. 633.

the decisions that the name or description of the other party must appear, since it takes two to make a bargain, and otherwise no contract is shown. The memorandum must not only contain the names or descriptions of the buyer¹⁷² and of the seller,¹⁷³ but must show which is buyer and which is seller.¹⁷⁴ A description of the parties, however, instead of their names, is sufficient, and parol evidence is admissible to identify the persons described.¹⁷⁵ Thus, when an agent signs his name without mentioning a principal, the other party may show that the contract was really made with the principal, who has chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name.¹⁷⁶ But the converse of the proposition does not hold

¹⁷² *Champion v. Plummer*, 1 Bos. & P. (N. R.) 252. See, also, *Sanborn v. Flagler*, 9 Allen (Mass.) 474, 476; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Mayer v. Adrian*, 77 N. C. 83; *Harvey v. Stevens*, 43 Vt. 657; *Peoria Grape Sugar Co. v. Babcock Co.* (C. C.) 67 Fed. 892.

¹⁷³ *Klinitz v. Surry*, 5 Esp. 267; *Vandenbergh v. Spooner*, L. R. 1 Exch. 316, 35 Law J. Exch. 201; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47; *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110; *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514.

¹⁷⁴ *Vandenbergh v. Spooner*, L. R. 1 Exch. 316, 35 Law J. Exch. 201; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 500; *Calkins v. Falk*, 1 Abb. Dec. (N. Y.) 291; *Nichols v. Johnson*, 10 Conn. 192; *Sanborn v. Flagler*, 9 Allen (Mass.) 474, 477; *Oglesby Grocery Co. v. Manufacturing Co.*, 112 Ga. 359, 37 S. E. 372. The requirement that the writing should show which is seller and which buyer has been relaxed in some cases, where parol evidence—for example, proof of the occupation of the parties—has been admitted to raise an inference on this point. *Newell v. Radford*, L. R. 3 C. P. 52, 37 Law J. C. P. 1; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493. But see dissenting opinion of Curtis, J., in the latter case, and *Grafton v. Cummings*, 99 U. S. 100, 111, 25 L. Ed. 366; *Mentz v. Newwitter*, supra.

¹⁷⁵ *Commins v. Scott*, L. R. 20 Eq. 11; *Catling v. King*, 5 Ch. Div. 660; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Jones v. Dow*, 142 Mass. 130, 7 N. E. 839. See, also, *American Iron & Steel Mfg. Co. v. Steel Co.* (C. C.) 101 Fed. 200.

¹⁷⁶ *Trueman v. Loder*, 11 Adol. & E. 589; *Dykers v. Townsend*, 24 N. Y. 57; *Sanborn v. Flagler*, 9 Allen (Mass.) 474, 477; *Gowen*

true, and an agent so contracting cannot show by parol that he did not intend to bind himself, since this would be to contradict the memorandum.¹⁷⁷

Same—Price.

The fourth section of the statute requires that "the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," while the seventeenth section simply requires that "some note or memorandum in writing of the said bargain be made." A fine distinction has been drawn in some cases between "agreement" and "bargain," the cases which maintain the distinction holding that "agreement" includes all the stipulations of the contract, and that, since the promise of one party is the consideration for the promise of the other, the memorandum must contain both promises.¹⁷⁸ But it is held, even by the courts which hold that a memorandum under the fourth section must state the consideration, that under the seventeenth section it is enough if the memorandum contain the promise or undertaking of the party to be charged, and that it need make no express reference to the promise of the other party.¹⁷⁹ And this rule is applied even where the memorandum is in the form of a mere offer, the acceptance of which

v. Klous, 101 Mass. 449; *Briggs v. Munchon*, 56 Mo. 467; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Brodhead v. Reinbald*, 200 Pa. 618, 50 Atl. 229, 86 Am. St. Rep. 735; *White v. Manufacturing Co.*, 179 Mass. 427, 60 N. E. 791; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Tiffany*, Ag. 233.

¹⁷⁷ *Higgins v. Senlor*, 8 Mees. & W. 834. See, also, *Nash v. Towne*, 5 Wall. (U. S.) 689, 18 L. Ed. 527; *Chandler v. Coe*, 54 N. H. 561; *Coleman v. Bank*, 53 N. Y. 388.

¹⁷⁸ The leading case holding that under the fourth section the memorandum must state the consideration is *Wain v. Warlters*, 5 East, 10, 2 Smith, Lead. Cas. (8th Ed.) 251. Many states have refused to follow it. See *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123, the leading case against the rule there decided. *Benj. Sales* (Corbin's 6th Am. Ed.) § 232, and note; *Id.* § 248. Cf. *Hayes v. Jackson*, 159 Mass. 451, 34 N. E. 683.

¹⁷⁹ *Egerton v. Mathews*, 6 East, 307; *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188; *Smith v. Ide*, 3 Vt. 290; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Kerr*, Dig. Sale, § 18; *Langd. Cas. Sales*, 1032. In some states there is an express provision either that the consideration must, or that it need not, be stated. See *Browne*, St. Frauds, §§ 376, 377.

is verbal,¹⁸⁰ though it is difficult to comprehend how a writing can be called a "memorandum" of a bargain when the bargain was not yet made at the time the writing was signed.¹⁸¹ But the price constitutes a material part of the bargain, and must be stated;¹⁸² though if the price be not agreed upon, but is implied, a memorandum which states no price is sufficient.¹⁸³

Same—Subject-Matter and Other Terms.

The memorandum must designate the goods sold,¹⁸⁴ and all the other terms and conditions of the contract, so far as to en-

¹⁸⁰ Warner v. Willington, 3 Drew, 523, 25 Law J. Ch. 662; Reuss v. Picksley, L. R. 1 Exch. 342, 35 Law J. Exch. 218; Sanborn v. Flagler, 9 Allen (Mass.) 474; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Farwell v. Lowther, 18 Ill. 252; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Kessler v. Smith, 42 Minn. 494, 44 N. W. 794; Lydig v. Braman, 177 Mass. 212, 58 N. E. 606; Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 52.

¹⁸¹ See Watts v. Alnsworth, 1 Hurl. & C. 83, 81 Law J. Exch. 448, per Bramwell, B.; Banks v. Manufacturing Co. (C. C.) 20 Fed. 667.

Where the statute requires the contract to be in writing, an oral acceptance is not sufficient. Kingman v. Davis, 63 Neb. 578, 88 N. W. 777; American Oak Leather Co. v. Porter, 94 Iowa, 117, 62 N. W. 658.

¹⁸² Elmore v. Kingscote, 5 Barn. & C. 583; Acebal v. Levy, 10 Bing. 376; Goodman v. Griffiths, 1 Hurl. & N. 574, 26 Law J. Exch. 145; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Ashcroft v. Butterworth, 136 Mass. 511; James v. Muir, 33 Mich. 223; Stone v. Browning, 68 N. Y. 598; Phelps v. Stillings, 60 N. H. 505; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841; Peoria Grape Sugar Co. v. Babcock Co. (C. C.) 67 Fed. 892; Reid v. Glass Co., 85 Fed. 193, 29 C. C. A. 110. Contra, O'Neill v. Crain, 67 Mo. 250. If the price is to be determined in a manner agreed upon, a memorandum stating the agreement on this point is sufficient. Atwood v. Cobb, 16 Pick. (Mass.) 227, 28 Am. Dec. 637; Argus Co. v. City of Albany, 55 N. Y. 495, 14 Am. Rep. 296; Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173; Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; Reid v. Glass Co., 85 Fed. 193, 29 C. C. A. 110.

¹⁸³ Hoadly v. McLaine, 10 Bing. 482; Ashcroft v. Morrin, 4 Man. & G. 450; Benj. Sales, § 249.

¹⁸⁴ Thornton v. Kempster, 5 Taunt. 786; Waterman v. Melgs, 4 Cush. (Mass.) 497; May v. Ward, 134 Mass. 127; Johnson v. Delbridge, 35 Mich. 436; Peoria Grape Sugar Co. v. Babcock Co. (C. C.) 67 Fed. 892 (quantity); American Iron & Steel Co. v. Mfg. Steel Co. (C. C.) 101 Fed. 200.

Where a contract to sell scrap iron obligates the buyer to purchase all the seller's iron which he might desire to sell, the seller having

able the court to ascertain what they were.¹⁸⁵ But parol evidence is admissible, as in the case of other writings, to identify the subject-matter,¹⁸⁶ to show the situation of the parties and the circumstances, and to explain the meaning of words and latent ambiguities.¹⁸⁷

the privilege to indicate what he desired to sell, the contract contained a sufficient description of the iron sold to satisfy the statute of frauds. *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 233, 62 N. E. 367.

¹⁸⁵ *McLean v. Nicoll*, 7 Jur. (N. S.) 909; *Pitts v. Beckett*, 13 Mees. & W. 743; *Archer v. Baynes*, 5 Exch. 625; *Coddington v. Goddard*, 16 Gray (Mass.) 436, 442; *Riley v. Farnsworth*, 116 Mass. 223 (a memorandum containing a clause that the vendor shall "fulfill the conditions of sale," but not setting forth the conditions, is defective); *Callanan v. Chapin*, 158 Mass. 113, 32 N. E. 941; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Stone v. Browning*, 68 N. Y. 598; *Johnson v. Buck*, 35 N. J. Law, 338, 343, 10 Am. Rep. 243; *James v. Muir*, 33 Mich. 223; *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Reld v. Kentworthy*, 25 Kan. 701; *Redus v. Holcomb* (Miss.) 27 South. 524; *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *J. T. Stewart & Son v. Cook*, 118 Ga. 541, 45 S. E. 398. Terms of payment: *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Wright v. Weeks*, 25 N. Y. 153; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54. Time of delivery, if agreed: *Kriete v. Myer*, 61 Md. 558; *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365; *Hawkins v. Chase*, 19 Pick. (Mass.) 502 (otherwise, if not agreed, since it will be presumed to be on demand).

¹⁸⁶ *Macdonald v. Longbottom*, 28 Law J. Q. B. 293, on appeal 1 El. & El. 977, 29 Law J. Q. B. 256 ("your wool"); *Barry v. Coombe*, 1 Pet. (U. S.) 640, 7 L. Ed. 295; *Tallman v. Franklin*, 14 N. Y. 584; *New England Dressed Meat & Wool Co. v. Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

¹⁸⁷ *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493; *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Benj. Sales*, §§ 213-215. In *Doherty v. Hill*, 144 Mass. 463, 11 N. E. 581, it was held that, under the fourth section, a memorandum describing equally two pieces of real estate could not be supplemented by introducing a letter from the owner to the agent, showing which estate he had authority to sell, nor by evidence that the purchaser only knew of one estate owned by the seller. See, also, *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388. In *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110, in a memorandum dated at Boston, "a house on Church street" was held a sufficient description. But see *Mellon v. Davison*, 123 Pa. 298, 16 Atl. 431; *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715; *Fortesque v. Crawford*, 106 N. C. 29, 10 S. E. 910. Cf. *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379. There are few cases involving the description under

Parol Evidence to Show That the Writing is Not a Note or Memorandum.

Since the note or memorandum implies the existence of a parol contract, it may be shown, for the purpose of proving the insufficiency of the memorandum, that it is not the record of any parol contract; either that no contract in fact existed,¹⁸⁸ or that the actual contract was different from that evidenced by the memorandum—for example, that it omitted a material term.¹⁸⁹ As was said by Lord Selborne, the statute of frauds “is a weapon of defense, and not offense, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.”¹⁹⁰

Parol Evidence as to Subsequent Agreement to Modify Original Contract.

At common law a written contract, not under seal, may be waived, annulled, changed, or qualified by means of a subsequent parol contract, written or unwritten. But this rule is not applicable to a contract which has been satisfied by a statutory note or memorandum. If the original contract be thus satisfied, a subsequent contract, not evidenced by a sufficient note or memorandum, to modify the original contract, is invalid.¹⁹¹

the seventeenth section, and those under the fourth section are conflicting. See Wood, St. Frauds, § 353; Williston, Cas. Sales, 2d ed., p. 979, note.

¹⁸⁸ *Hussey v. Horne-Payne*, 4 App. Cas. 315, per Lord Cairns, at page 320.

¹⁸⁹ *Pitts v. Beckett*, 13 Mees. & W. 743 (that the wool sold should be dry); *McMullen v. Helberg*, 4 L. R. Ir. 94, 6 L. R. Ir. 463 (that the sale was by sample); *McLean v. Nicoll*, 7 Jur. (N. S.) 999 (that glass should be of best quality); *Peltier v. Collins*, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711 (warranty); *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196 (that the goods are to be subject to approval); *Remick v. Sandford*, 118 Mass. 102 (that sale was by sample). See, also, *Jenness v. Iron Co.*, 53 Me. 20; *Lang v. Henry*, 54 N. H. 57; *Frank v. Miller*, 38 Md. 450; *Lee v. Hills*, 66 Ind. 474; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407. And see note 185, ante.

¹⁹⁰ *Hussey v. Horne-Payne*, 4 App. Cas. 311, 323.

¹⁹¹ *Stead v. Dawber*, 10 Adol. & E. 57, overruling *Cuff v. Penn*, 1 Maule & S. 21; *Marshall v. Lynn*, 6 Mees. & W. 109; *Swain v. Sen-*

The subsequent contract being invalid, the original contract may be enforced.¹⁹² But whether parol evidence is admissible to prove a subsequent contract for a waiver or abandonment of the entire contract is an open question.¹⁹³ Parol evidence is admissible, however, to prove substantial performance when the performance is completed and accepted, and such performance is a defense by way of accord and satisfaction.¹⁹⁴

Separate Papers.

It is immaterial whether the note or memorandum be written at one time, or at different times, and it may consist of any number of letters, telegrams, or other pieces of paper. If the connection between the papers be physical, it is enough if they were attached at the time of signature, and this may be shown

mens, 9 Wall. (U. S.) 254, 269, 19 L. Ed. 554; Ladd v. King, 1 R. I. 224, 51 Am. Dec. 624; Dana v. Hancock, 30 Vt. 616; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Hill v. Blake, 97 N. Y. 216; Carpenter v. Galloway, 73 Ind. 418; Helsley v. Swannstrom, 40 Minn. 196, 41 N. W. 1029; Burns v. Real Estate Co., 52 Minn. 31, 53 N. W. 1017; Reid v. Glass Co., 85 Fed. 193, 29 C. C. A. 110; Lawyer v. Post, 109 Fed. 512, 47 C. C. A. 491; Walter v. Bloede Co., 94 Md. 80, 50 Atl. 433; Warren v. Manufacturing Co., 161 Mo. 112, 61 S. W. 644. Cf. Cummings v. Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. (Mass.) 31; Whittier v. Dana, 10 Allen (Mass.) 326; Negley v. Jeffers, 23 Ohio St. 90. See, also, Richardson v. Cooper, 25 Me. 450.

¹⁹² Moore v. Campbell, 10 Exch. 323, 23 Law J. Exch. 310; Noble v. Ward, L. R. 1 Exch. 117, 35 Law J. Exch. 81.

A voluntary forbearance by one party at the request of the other does not prevent the former from determining his forbearance and reverting to his rights under the contract; and parol evidence of such forbearance may be given, the effect of such evidence being, where the request for forbearance came from the defendant, to estop him from averring that the plaintiff was not ready and willing to perform according to the contract. Hickman v. Haynes, L. R. 10 C. P. 598; Benj. Sales, § 217a. See, also, Smiley v. Barker, 83 Fed. 684, 28 C. C. A. 9.

¹⁹³ Goss v. Lord Nugent, 5 Barn. & Adol. 65, per Denman, C. J.; Harvey v. Graham, 5 Adol. & E. 61, 73. The affirmative was held in Buel v. Miller, 4 N. H. 196.

¹⁹⁴ Moore v. Campbell, 10 Exch. 323, per Parke, B.; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Long v. Hartwell, 34 N. J. Law, 116, 127; Ladd v. King, 1 R. I. 224, 231, 51 Am. Dec. 624; Swain v. Seamans, 9 Wall. (U. S.) 254, 19 L. Ed. 554; Langd. Cas. Sales, 1034.

by parol.¹⁹⁵ If they were never attached, the signed paper must make such a reference to the other as to enable the court to construe the whole together, as containing all the terms of the bargain.¹⁹⁶ If they are not connected by attachment or reference, they cannot be connected by parol.¹⁹⁷ Parol evidence is, however, admissible to explain an ambiguous reference, and to identify the document to which the signed paper refers.¹⁹⁸

¹⁹⁵ *Kenworthy v. Schofield*, 2 Barn. & C. 945, per Holroyd, J.

¹⁹⁶ *Saunderson v. Jackson*, 2 Bos. & P. 238; *Jackson v. Lowe*, 1 Bing. 9; *Salmon Falls Mfg. Co. v. Goddard*, 20 Curt. Dec. 376, 14 How. (U. S.) 446, 14 L. Ed. 493; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Fisher v. Kuhn*, 54 Miss. 480; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125; *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; *Bayne v. Wiggins*, 189 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144; *Third Nat. Bank v. Steel*, 120 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119; *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562; *Cobb v. Lumber Co.*, 57 W. Va. 49, 49 S. E. 1003, 110 Am. St. Rep. 734. But if all the separate papers are signed, reference in the one to the other need not be made, if by inspection and comparison it appears that they severally form part of the same transaction. *Thayer v. Luce*, 22 Ohio St. 62. The paper referred to need not be in existence when the signed paper is executed. *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 220, 12 L. R. A. 561, 26 Am. St. Rep. 244.

¹⁹⁷ *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 Barn. & C. 945; *Pierce v. Corf*, L. R. 9 Q. B. 210; *Boydell v. Drummond*, 11 East, 142; *Jacob v. Kirk*, 2 Mood. & R. 221; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Morton v. Dean*, 13 Metc. (Mass.) 395; *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550; *Frank v. Miller*, 38 Md. 450; *Brown v. Whipple*, 58 N. H. 229; *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Turner v. Lorillard Co.*, 100 Ga. 645, 23 S. E. 383, 62 Am. St. Rep. 345; *Swallow v. Strong*, 83 Minn. 87, 85 N. W. 942. But in *Lerned v. Wannemacher*, 9 Allen (Mass.) 412, it was held that, when a memorandum is drawn up in duplicate, one signed by the seller and the other by the buyer, they may be read together as if signed by both. See, also, *Rhoades v. Castner*, 12 Allen (Mass.) 130. In *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706, where the memorandum was indorsed on an order of sale, but, without referring to it, the court held that there was no connection. Followed in *Wilschach v. Heyd*, 122 Ind. 574, 23 N. E. 963.

¹⁹⁸ *Ridgway v. Wharton*, 6 H. L. Cas. 238 (Instructions); *Baumann v. James*, 3 Ch. App. 508 ("terms agreed upon"); *Long v. Millar*, 4 C. P. Div. 450 ("purchase"); *Cave v. Hastings*, 7 Q. B. Div. 125 ("our arrangement"); *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496 (but see *Grafton v. Cummings*, 99 U. S. 100, 112, 25 L. Ed. 866); *White v. Breun*, 106 Ala. 159, 19 South. 50, 32 L. R. A. 127; *Strouse v. Elting*,

Papers connected by reference must be consistent, for otherwise it would be impossible to determine what the bargain was without parol evidence to show which stated it correctly.¹⁹⁹ The memorandum may be in pencil.²⁰⁰

SAME—SIGNATURE OF THE PARTY.

37. Only the signature of the party against whom the contract is sought to be enforced is required.

38. The signature may be by mark or initials, and may be written in pencil. Unless the statute requires the name to be "subscribed," the signature may be printed, and may be at the beginning or in the body of the document.

Although the seventeenth section requires the writing to be signed by the "parties"²⁰¹ to be charged, the memorandum is sufficient if signed only by the party against whom the contract is sought to be enforced.²⁰² It follows that the contract is good or not at the option of the party who has not signed.

110 Ala. 132, 20 South. 123; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. An extreme application of the rule admitting parol evidence was made in *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212. The late case of *Oliver v. Hunting*, 44 Ch. Div. 205, seems irreconcilable with the earlier decisions.

A letter beginning "Dear sir," and the addressed envelope in which it came, may be read together. *Pearce v. Gardner* (1897) 1 Q. B. 688.

¹⁹⁹ *Smith v. Surman*, 9 Barn. & C. 561; *Thornton v. Kempster*, 5 Taunt. 786. *Calkins v. Falk*, 1 Abb. Dec. (N. Y.) 291; *Phlippen v. Hyland*, 19 U. C. C. P. 416.

²⁰⁰ *Clason's Ex'rs v. Balley*, 14 Johns. (N. Y.) 484; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

²⁰¹ The language of the fourth section is "by the party to be charged."

²⁰² *Allen v. Bennet*, 3 Taunt. 169; *Thornton v. Kempster*, 5 Taunt. 786; *Clason's Ex'rs v. Balley*, 14 Johns. (N. Y.) 484; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Justice v. Lang*, 42 N. Y. 403, 1 Am. Rep. 576; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 31, 66 Am. Dec. 394; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L.

The signature may be by mark,²⁰³ though not by mere description,²⁰⁴ or may be by initials, if they are intended as a signature.²⁰⁵ It may be written in pencil;²⁰⁶ or it may be printed, provided there is sufficient evidence of the adoption of the printed name, as where the seller fills out and gives the buyer a bill of parcels, with the name of the seller printed thereon.²⁰⁷ Some statutes require the name to be "subscribed," and under them the signature must be at the end.²⁰⁸ Under the original enactment, however, and generally in the absence of express provisions requiring a different construction, the signature is good, though it be at the beginning or in the body of the document; but, if the name is put in an unusual place, it is a question of fact whether it was so written for the purpose of authenticating the document.²⁰⁹ As was said by Lord West-

R. A. 87; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Cunningham v. Williams*, 43 Mo. App. 620. See, also, *Reuss v. Picksley*, L. R. 1 Exch. 342, and other cases cited in note 180, ante, which hold that a written offer accepted by parol is a sufficient memorandum. Contra: *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708.

²⁰³ *Baker v. Dening*, 8 Adol. & E. 94 (under fifth section). See, also, *Zacharie v. Franklin*, 12 Pet. (U. S.) 151, 9 L. Ed. 1035.

²⁰⁴ A letter by a mother to her son, beginning, "My dear Robert," and ending, "Your affectionate mother," with a full direction containing the son's name and address, is not sufficiently signed. *Selby v. Selby*, 3 Mer. 2.

²⁰⁵ *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493. See *Palmer v. Stephens*, 1 Denio (N. Y.) 471; *Benj. Sales*, § 257. The omission of a middle name is immaterial. *Fessenden v. Mussey*, 11 Cush. (Mass.) 127.

²⁰⁶ *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Clason's Ex'rs v. Bailey*, 14 Johns. (N. Y.) 484.

²⁰⁷ *Saunderson v. Jackson*, 2 Bos. & P. 238; *Schneider v. Norris*, 2 Maule & S. 226; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Com. v. Ray*, 3 Gray (Mass.) 441, 447. Otherwise where the statute requires the name to be "subscribed." *Viele v. Osgood*, 8 Barb. (N. Y.) 130. Signing by means of a rubber stamp is sufficient. In re *Deep River Nat. Bank*, 73 Conn. 341, 47 Atl. 675.

²⁰⁸ *Davis v. Shields*, 26 Wend. (N. Y.) 341; *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Doughty v. Brass Co.*, 101 N. Y. 644, 4 N. E. 747. Contra: *California Canneries Co. v. Scatena*, 117 Cal. 447, 40 Pac. 462.

²⁰⁹ *Johnson v. Dodgson*, 2 Mees. & W. 653; *Durrell v. Evans*, 1

bury, in a case ²¹⁰ under the fourth section, where it was held that the name, which occurred in the body of the instrument, referred only to the particular part in which it was found, and was insufficient: "The signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument."

SAME-AGENTS AUTHORIZED TO SIGN.

- 39. The authority of an agent to sign the memorandum may be conferred by parol, and may be proved by subsequent ratification.**
- 40. The agent must be a third person, and not one of the parties; but a person who acts as the agent of one party in making the contract may act as the agent of both parties in making the memorandum.**

The statute simply provides that the note or memorandum shall be signed by the parties to be charged, "or their agents thereunto lawfully authorized." The manner in which their agents may be authorized is left to the rules of the common law. Thus the agent need not be authorized in writing, and subsequent ratification is equivalent to prior appointment.²¹¹ And,

Hurl. & C. 174, 31 Law J. Exch. 337; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484; Hawkins v. Chase, 19 Pick. (Mass.) 502; Penniman v. Hartshorn, 13 Mass. 87; Coddington v. Goddard, 16 Gray (Mass.) 436; Batturs v. Sellers, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343; Anderson v. Harold, 10 Ohio, 400; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Tingley v. Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; New England Dressed Meat & Wool Co. v. Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516; Anderson v. Manufacturing Co., 30 Wash. 147, 70 Pac. 247; Ferguson v. Trovaten, 94 Minn. 209, 102 N. W. 873. Defendants' clerk by their authority drew up a letter addressed to them, containing the terms on which plaintiff was to serve them, which plaintiff signed. Held, that the letter was a sufficient memorandum to bind defendants. *Evans v. Hoare* [1892] 1 Q. B. 593. See, also, *Smith v. Howell*, 11 N. J. Eq. 349; *Adams v. Field*, 21 Vt. 256; *John Griffith's Corp. v. Humber* [1899] 2 Q. B. 414.

²¹⁰ *Caton v. Caton*, L. R. 2 H. L. 127.

²¹¹ *Maclean v. Dunn*, 4 Bing. 722; *Soames v. Spencer*, 1 Dowl. & R. 32; *Hawkins v. Chase*, 19 Pick. (Mass.) 502, 505; *Batturs v. Sel-*

as we have seen, it is immaterial whether the agent sign his own name or that of his principal.²¹² Authority to contract implies authority to sign the memorandum, and the memorandum may be made subsequently to the contract, if the authority has not been revoked.²¹³

Who may be Agent to Sign.

The agent to sign must be a third person, and not the other party to the contract.²¹⁴ This rule does not, however, exclude the agent of the seller from acting as the agent of buyer,²¹⁵ but such agency must be clearly proved. For example, the mere fact that the seller's salesman signs his own name to the memorandum at the request of the buyer is not proof of agency to sign the buyer's name.²¹⁶

The auctioneer at a public sale is the agent of the buyer as well as of the seller to sign the memorandum.²¹⁷ "The tech-

lers, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492; Yerby v. Grigsby, 9 Leigh (Va.) 387; Conaway v. Sweeney, 24 W. Va. 643; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Wiener v. Whipple, 53 Wis. 298, 302, 10 N. W. 433, 40 Am. Rep. 775.

²¹² Ante, p. 103. See, also, Williams v. Bacon, 2 Gray (Mass.) 387; Yerby v. Grigsby, 9 Leigh (Va.) 387; Conaway v. Sweeney, 24 W. Va. 649; Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16.

²¹³ Williams v. Bacon, 2 Gray (Mass.) 387, per Merrick, J.; Farmer v. Robinson, cited in note to Heyman v. Neale, 2 Camp. 337.

²¹⁴ Sharman v. Brandt, L. R. 6 Q. B. 720; Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 Barn. & Ald. 333; Smith v. Arnold, 5 Mason (U. S.) 414, Fed. Cas. No. 13,004; Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 205; Johnson v. Buck, 35 N. J. Law, 338, 342, 10 Am. Rep. 243; Tull v. David, 45 Mo. 444, 100 Am. Dec. 385. Cf. Snyder v. Wolford, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22.

²¹⁵ Durrell v. Evans, 30 Law J. Exch. 254, 6 Hurl. & N. 660; Benj. Sales, §§ 267, 267a. Where plaintiffs' travelling salesman called on defendant, and was authorized by him to transmit to his principals an offer for the purchase of cotton, a letter written by the salesman to plaintiffs, transmitting the offer so made, was not such a memorandum as would charge defendant under the statute of frauds; the salesman not being his agent in the transaction. Wilson v. Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680.

²¹⁶ Graham v. Musson, 5 Bing. N. C. 603; Graham v. Fretwell, 3 Man. & G. 369; Murphy v. Boese, L. R. 10 Exch. 126. See, also, Sewall v. Fitch, 8 Cow. (N. Y.) 215; Ijams v. Hoffman, 1 Md. 423; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

²¹⁷ Simon v. Metivier, 1 Wm. Bl. 590; Hinde v. Whitehouse, 7 East,

nical ground is," as was said by Shaw, C. J., "that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers on the auctioneer or his clerk authority to sign his name, and this is the whole extent of his authority."²¹⁸ It follows that the auctioneer's authority to sign the memorandum ends with the sale, and that a memorandum subsequently signed is invalid,²¹⁹ and that he is not the agent to sign for the buyer at a private sale.²²⁰ Nor can the auctioneer, if he is himself the seller, bind the buyer by signing the memorandum.²²¹ The auctioneer's clerk, as well as the auctioneer himself, may make the memorandum, provided, at least, that he acts openly in entering the bids, so that the assent of the bidder may be implied.²²²

558; *Morton v. Dean*, 13 Metc. (Mass.) 385; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Harvey v. Stevens*, 43 Vt. 653; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Gill v. Hewett*, 7 Bush (Ky.) 10; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253; *Garth v. Davis*, 120 Ky. 106, 85 S. W. 692. Cf. *Dunham v. Hartman*, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.

²¹⁸ *Gill v. Bicknell*, 2 Cush. (Mass.) 355, at page 358. See, also, *Emmerson v. Heells*, 2 Taunt. 38, per Sir James Mansfield. The inference of agency to sign for the bidders may be rebutted. *Bartlett v. Purnell*, 4 Adol. & E. 792.

Between the fall of the hammer and the making of the memorandum, the bidder has a *locus pœnitentiæ*, and may withdraw his bid. *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484; *Dunham v. Hartman*, *supra*.

²¹⁹ *Horton v. McCarty*, 53 Me. 394. Cf. *Smith v. Arnold*, 5 Mason (U. S.) 414, Fed. Cas. No. 13,004, per Story, J.; *Bamber v. Savage*, 52 Wis. 110, 113, 8 N. W. 609, 38 Am. Rep. 723.

The vendor is bound, though the auctioneer does not sign till the next day; his authority not having been revoked. *White v. Mfg. Co.*, 179 Mass. 427, 60 N. E. 791.

²²⁰ *Mews v. Carr*, 1 Hurl. & N. 486, 26 Law J. Exch. 39. Cf. *Bartlett v. Purnell*, 4 Adol. & E. 792.

²²¹ *Farebrother v. Slimmons*, 5 Barn. & Ald. 333; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Johnson v. Buck*, 35 N. J. Law, 338, 342, 10 Am. Rep. 243; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385.

²²² *Bird v. Boulter*, 4 Barn. & Adol. 443; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Cathcart v. Keirnaghan*, 5 Strob. (S. C.) 129; *Gill v. Bicknell*, 2 Cush. (Mass.) 355, 358; *Frost v. Hill*, 3

The signature of a clerk of a telegraph company to a dispatch, the sending of which is authorized by either party, is sufficient.²²⁸ An agent must sign as such, and his signature as a mere witness is inoperative.²²⁴

Same—Broker.

Brokers are as a rule agents for both parties. When so acting, they have authority to do all that is necessary to bind the bargain, and hence may sign the requisite memorandum.²²⁸ In this country it is customary for the broker to make an entry of the sale in a book kept for that purpose, and such an entry, if it contains the terms of the bargain, is a sufficient memorandum,²²⁹ nor need it be signed by the broker.²²⁷ A note containing the terms of the bargain, and delivered by him to either party, is also sufficient,²²⁸ though, if he delivers to buyer and seller notes which materially differ, there is no valid memorandum.²²⁹

In England it is customary for the broker, when he makes a contract, to reduce it to writing, and to deliver to each party a copy of the terms as reduced to writing by him, and also

Wend. (N. Y.) 386; Coate v. Terry, 24 U. C. C. P. 571. But it seems that there is no general custom by which the clerk as such is the bidder's agent. Pierce v. Corf, L. R. 9 Q. B. 210, 215, per Blackburn, J. Cf. Cathcart v. Keirnaghan, 5 Strob. (S. C.) 129, per Waldlaw, J.

²²⁸ Godwin v. Francis, L. R. 5 C. P. 205; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Howley v. Whipple, 48 N. H. 487; Gray, Communication Tel. §§ 138-142.

²²⁴ Gosbell v. Archer, 2 Adol. & E. 500.

²²⁵ Coddington v. Goddard, 16 Gray (Mass.) 436.

²²⁶ Coddington v. Goddard, 16 Gray (Mass.) 436; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484; Merritt v. Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; Sale v. Darragh, 2 Hill. (N. Y.) 184; Williams v. Woods, 16 Md. 220; Bacon v. Eccles, 43 Wis. 227.

²²⁷ Coddington v. Goddard, 16 Gray (Mass.) 436; Merritt v. Clason, 12 Johns. (N. Y.) 102; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484.

²²⁸ Butler v. Thomson, 92 U. S. 412, 23 L. Ed. 684; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Remick v. Sandford, 118 Mass. 102; Newberry v. Wall, 84 N. Y. 570; Weldmann v. Champion (N. Y.) 12 Daly, 522; Bacon v. Eccles, 43 Wis. 227.

²²⁹ Peltier v. Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Suydam v. Clark, 2 Sandf. (N. Y.) 133; Bacon v. Eccles, 43 Wis. 227; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, per Jackson, J.

to enter them in his book and to sign the entry.²²⁰ As to the effect of the entry in the broker's book, there has been great difference of opinion. According to Benjamin, the view which seems to have prevailed, unlike that adopted in this country, and founded, perhaps, in some measure on the fact that brokers in London were until recently required by law to make such entries, is that the entry constitutes the contract itself, and is a contract in writing;²²¹ but this at the present day is doubtful.²²² Difficult questions have arisen in England, where the sold note and the bought note differ from each other or from the entry in the broker's book. The result of the English decisions on this point, which owing to the difference in the law and the custom are of comparatively little value as precedents in this country, may be briefly stated as follows:²²³ A signed entry by the broker of the terms of the contract is a good memorandum, and in some cases may constitute a contract in writing.²²⁴ Where the contract has been reduced to writing, it will not be affected by subsequent bought and sold notes containing other terms, unless the parties have agreed to make a new contract in accordance with the terms of the notes;²²⁵ but

²²⁰ Benj. Sales, § 276.

²²¹ Heyman v. Neale, 2 Camp. 337, per Lord Ellenborough; Thornton v. Charles, 9 Mees. & W. 802, per Parke, B.; Sleewright v. Archibald, 17 Q. B. 115, 20 Law J. Q. B. 529, per Lord Campbell, C. J., and Patterson, J.; Thompson v. Gardiner, 1 C. P. Div. 777. Contra: Thornton v. Meux, Moody & M. 43, per Abbott, C. J.; Townend v. Drakeford, 1 Car. & K. 20, per Denman, C. J.; Thornton v. Charles, supra, per Lord Abinger. But these authorities are overruled in Sleewright v. Archibald, supra. Benj. Sales, § 291.

²²² Benj. Sales (5th Eng. Ed.) 287, 302. See, also, Langdell, Cas. Sales, 1035.

²²³ The statement, in substance, is taken from Benj. Sales (5th Eng. Ed.) 302, where it is said that the propositions are fairly deducible from the authorities, though some of the points cannot be considered as finally settled. The authorities cited for the several propositions are found in notes 234-240, infra.

²²⁴ Thornton v. Charles, 9 Mees. & W. 802 (per Parke, B.); Sleewright v. Archibald, supra (per Lord Campbell and Patterson, J.); Thompson v. Gardiner, 1 C. P. Div. 777.

²²⁵ Heyworth v. Knight, 17 C. B. (N. S.) 298; Hawes v. Forster, 1 Mood. & R. 368, as explained by Parke, B., in Thornton v. Charles, supra. See, also, Lewis v. Brass, 3 Q. B. Div. 667.

evidence of an intention (which may be inferred from the course of dealing between the parties or the usage of trade) to contract only by means of two notes, is relevant to show that what was apparently a concluded contract was not intended to be such.²³⁶ The bought and sold notes are deemed to constitute a single document.²³⁷ If they differ, they are nullities,²³⁸ unless the parties have assented to one as containing the terms of the contract, in which case the difference is immaterial.²³⁹ The bought and sold notes are *prima facie* presumed to agree, and, therefore, if one is put in evidence, the other will be presumed to correspond with it, until the contrary is shown.²⁴⁰

EFFECT OF NONCOMPLIANCE WITH THE STATUTE.

41. Failure to comply with the provisions of the statute in respect to acceptance and receipt, earnest or part payment, or note or memorandum, [probably] does not render the contract void, but merely prevents its enforcement.

The seventeenth section declares that, if there be no acceptance and receipt, no earnest or part payment, and no note or memorandum, the contract shall not "be allowed to be good."²⁴¹ As to the meaning of these words, there are in England conflicting dicta, but no direct decision; some judges assuming that the words of the seventeenth section (unlike those of the fourth section, which declares that "no action shall

²³⁶ *Heyworth v. Knight*, supra; *Cowie v. Remfry*, 5 Moore, P. C. 232; *Moore v. Campbell*, 10 Exch. 323.

²³⁷ *Sievwright v. Archibald*, supra; *Grant v. Fletcher*, 5 Barn. & C. 436; *Goom v. Afalo*, 6 Barn. & C. 117.

²³⁸ *Sievwright v. Archibald*, supra; *Grant v. Fletcher*, supra; *Gregson v. Ruck*, 4 Q. B. 747; *Caerleon Tin Plate Co. v. Hughes*, 65 Law J. 118, 119.

²³⁹ *Rowe v. Osborne*, 1 Starkle, 140; *Moore v. Campbell*, 10 Exch. 323.

²⁴⁰ *Hawes v. Forster*, 1 Mood. & R. 368; *Parton v. Crofts*, 16 C. B. (N. S.) 11.

²⁴¹ Sales Act, § 4 (1) substitutes "enforceable by action." So Sale of Goods Act, § 4 (1). See *Taylor v. Railway Co.* (1901) 1 Q. B. 774; Benj. Sales (5th Eng. Ed.) 306.

be brought")²⁴² go to the existence of the contract,²⁴³ and others that there is no difference in the effect of the two sections, and that the provision affects only the remedy.²⁴⁴ The latter view is sustained by the weight of opinion,²⁴⁵ and is certainly in conformity with the construction of the section in other respects,—for example, that, if one party has signed the contract, it may be enforced against him, though not against the other; that a mere written admission at any time before action brought, even if it repudiates the contract, is sufficient, because it is evidence of the existence of the contract; that acceptance and receipt or part payment before action brought satisfies the section. This view has been affirmed by decision in Massachusetts,²⁴⁶ though the opposite view has been taken in Missouri.²⁴⁷ In some states, however, the statute declares that the contract shall be "void."

²⁴² See Clark, *Cont.* (2d Ed.) 91.

²⁴³ *Leroux v. Brown*, 12 C. B. 809; *Laythorp v. Bryant*, 2 Bing. N. C. 735, 747.

²⁴⁴ *Balley v. Sweeting*, 9 C. B. (N. S.) 843, 30 Law J. C. P. 150, per Williams, J.; *Maddison v. Alderson*, 8 App. Cas. 467, 488, per Lord Blackburn; *Britain v. Rossiter*, 11 Q. B. Div. 123, 127, per Brett, L. J.

²⁴⁵ *Pol. Cont.* (2d Am. Ed.) 605; *Anson, Cont.* 67. See *Browne, St. Frauds*, c. 8; 9 Am. Law Rev. 434.

²⁴⁶ *Townsend v. Hargraves*, 118 Mass. 325; *Amsinck v. Insurance Co.*, 129 Mass. 185; *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. See, also, *Jackson v. Stanfield*, 137 Ind. 592, 37 N. E. 14, 23 L. R. A. 588; *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571; *Cowell v. Insurance Co.*, 126 N. C. 684, 36 S. E. 184. Cf. *Stockdale v. Dunlop*, 6 Mees. & W. 224.

²⁴⁷ *Houghtaling v. Ball*, 20 Mo. 563. To the same effect, *Green v. Lewis*, 26 U. C. Q. B. 618.

CHAPTER III.

EFFECT OF THE CONTRACT IN PASSING THE PROPERTY— SALE OF SPECIFIC GOODS.

- 42. In General.
- 43. Rules for Ascertaining Intention.
- 44. Reservation of Right of Possession or Property.
- 45. Sale on Approval or Trial.
- 46. Sale or Return.

IN GENERAL.

- 42. (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.¹

Executed and Executory Sales.

The distinction between sales and contracts to sell has been already pointed out.² As we have seen, in a sale the property passes at once, and in a contract to sell it does not pass until the contract is executed by the seller. In the one case the seller sells; in the other, he promises to sell. We have also seen that the goods which are the subject of sale must, as a rule, be owned by the seller, and that a contract to sell goods not yet in existence or acquired by the seller can only take effect as a contract to sell.³ Moreover, even if the goods which are the subject of sale are actually owned by the seller, it is clear that if they are part of other similar goods, as 10 sheep out of a flock of 20, the property in the part sold cannot pass unless the particular goods are designated; in other words, unless the goods are specific.⁴ But provided the goods are specific, the

¹ See Sales Act, § 18; Sale of Goods Act, § 17.

² Ante, p. 2.

³ Ante, p. 46.

⁴ Post, p. 147.

rule holds universally that the property in them will pass whenever the parties so intend.⁵ And, therefore, whether a sale be executed or executory, and, if originally executory, when it will become executed, depends solely upon the intention of the parties. The intention is to be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case.⁶ If the intention is clear, no question can arise. But because the parties often fail to make clear their intention, frequently for lack of clearness in the intention itself, the courts have established certain rules of interpretation for the purpose of determining what is to be deemed the intention of the parties.⁷

Delivery.

It is universally held that delivery of the goods is not essential to the transfer of the property to the buyer.⁸ In some jurisdictions, however, an exception to this rule is recognized, and it is held that delivery is necessary to transfer the property as against bona fide purchasers from the seller and as against attaching creditors without notice of the prior sale.⁹ This doctrine is to be distinguished from the doctrine that retention of possession by the seller is a fraud upon the seller's creditors and that in such case the sale can be avoided by them.¹⁰ The pres-

⁵ *Seath v. Moore*, 11 App. Cas. 350, 370, 380; *Shepherd v. Harrison*, L. R. 5 H. L. 116, 127; *Hatch v. Oil Co.*, 100 U. S. 124, 130, 25 L. Ed. 554; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180, 187, 22 L. Ed. 803; *Merchants' Exch. Bank v. McGraw*, 8 C. C. A. 420, 59 Fed. 972; *Terry v. Wheeler*, 25 N. Y. 520, 525; *Callaghan v. Myers*, 89 Ill. 566, 570; *Winslow v. Leonard*, 24 Pa. 14, 62 Am. Dec. 354; *Kent Iron & Hardware Co. v. Norbeck*, 150 Pa. 559, 24 Atl. 737; *Lingham v. Eggleston*, 27 Mich. 324; *Hovey v. Gow*, 81 Mich. 314, 45 N. W. 985; *Kneeland v. Renner*, 2 Kan. App. 451, 43 Pac. 95; *O'Farrel v. McClure*, 5 Kan. App. 880, 47 Pac. 160; *State v. Wharton*, 117 Wis. 558, 94 N. W. 359; *Blackb. Sales*, 123; *Benj. Sales*, § 309.

⁶ *Byles v. Collier*, 54 Mich. 1, 19 N. W. 565; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Day v. Gravel*, 72 Minn. 159, 75 N. W. 1; *Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Wadhams & Co. v. Balfour*, 32 Or. 313, 51 Pac. 642; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Branigan v. Hendrickson*, 17 Ind. App. 198, 46 N. E. 500; *Smith v. Investment Co.*, 114 Wis. 151, 89 N. W. 829; *State v. Wharton*, 117 Wis. 558, 94 N. W. 359. See, also, cases in preceding note.

⁷ Post, p. 121.

⁸ Post, p. 121.

⁹ Post, p. 204.

¹⁰ Post, p. 197.

ent discussion is confined to the transfer of the property between the seller and the buyer, and the effect upon the rights of third persons of the failure to deliver the goods will be considered later.

RULES FOR ASCERTAINING INTENTION.

43. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer:

Rule 1.—UNCONDITIONAL CONTRACT. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.¹¹

Rule 2.—GOODS TO BE PUT INTO DELIVERABLE STATE. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state—that is, into a state in which the buyer is bound to accept them—the property does not pass until such thing is done.¹²

Rule 3.—PRICE TO BE ASCERTAINED BY WEIGHING, MEASURING, OR TESTING. Where there is a contract for the sale of specific goods in a deliverable state, but the seller, or, in some jurisdictions, the buyer, is bound to weigh, measure, test, or do some other act with reference to the goods, for the purpose of ascertaining the price, the property does not pass until such act is done. In other jurisdictions, this rule does not prevail.

Rule 1.—Unconditional Contract.

Neither delivery of the goods nor payment of the price is requisite for vesting the property in the goods in the buyer; but the property passes by the contract itself, if such is the intention of the parties. Such has always been the rule of the common law in regard to delivery; but it seems to have been the

¹¹ See Sales Act, § 19, rule 1.

¹² See Sales Act, § 19, rule 2.

law in early times that payment of the price was a condition precedent to the vesting of the property in the buyer, unless the sale was upon credit—that is, unless by the contract the buyer was entitled to possession of the goods before paying the price.¹³ By the modern English rule, however, if the goods are specific and in a deliverable state, and a different intention does not appear, the property passes immediately.¹⁴ “By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties.”¹⁵ The distinction between the property and the right to possession must be borne in mind, for, although the property passes, the buyer is not entitled, unless credit is given, to possession of the goods without payment of the price—in other words, the property passes subject to the seller’s lien;¹⁶ and neither is the seller bound to deliver possession, nor the buyer to pay the price, except upon performance by the other party.¹⁷ It follows that an intention to defer the vesting of the property is not shown by a stipulation that possession is not to be delivered until payment of the price,¹⁸ or by the fact that nothing is said as to the time of payment or delivery. “Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be

¹³ Noy, *Max.* pp. 87–89; *Blackb. Sales*, 171; *Benj. Sales*, § 315; 2 *Kent, Comm.* 492.

¹⁴ *Tarling v. Baxter*, 6 *Barn. & C.* 360; *Slimmons v. Swift*, 5 *Barn. & C.* 862, per Bayley, J.; *Dixon v. Yates*, 5 *Barn. & Adol.* 313, per Park, J.; *Barr v. Gibson*, 3 *Mees. & W.* 390; *Martindale v. Smith*, 1 *Q. B.* 389; *Gilmour v. Supple*, 11 *Moore, P. O.* 566; *Seath v. Moore*, 11 *App. Cas.* 350, 370; *Sale of Goods Act*, § 18, rule 1; *Benj. Sales*, §§ 313, 317.

¹⁵ *Gilmour v. Supple*, 11 *Moore, P. O.* 566. See, also, *Calcutta Co. v. De Mattos*, 32 *Law J. Q. B.* 322, 323, where Blackburn, J., pronounced this “a very accurate statement of the law.”

It seems that such an intention is shown by the circumstances of the case in a sale by a shopman over the counter. *Bussey v. Barnett*, 9 *Mees. & W.* 312; *Blackb. Sales*, 173. Cf. *Paul v. Reed*, 52 *N. H.* 133.

¹⁶ *Post*, p. 312.

¹⁷ *Post*, p. 203.

¹⁸ *Tarling v. Baxter*, *supra*.

done to the goods, although he cannot take them away without paying the price."¹⁰

The general rule in this country coincides with the English rule, and it is held that if the parties have agreed upon the specific goods, and nothing remains but that the buyer shall pay the price and take the goods, the property passes to the buyer, with the consequent risk of loss from fire or other accident.²⁰ It is often said, indeed, that in a cash sale (and all sales in which no time is agreed upon for payment are *prima facie* cash sales)²¹ the property does not pass until payment, and some cases appear so to hold.²² It is always possible for the parties to agree that the property shall not pass until payment,

¹⁰ *Simmons v. Swift*, *supra*, per Bayley, J.

²⁰ *Leonard v. Davis*, 1 Black (U. S.) 476, 483, 17 L. Ed. 222; *Blunt v. Little*, 3 Mass. (U. S.) 107, 110, Fed. Cas. No. 1,578; *Morse v. Sherman*, 106 Mass. 430; *Haskins v. Warren*, 115 Mass. 514, 533; *Goddard v. Binney*, 115 Mass. 450, 455, 15 Am. Rep. 112; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Wing v. Clark*, 24 Me. 306; *Phillips v. Moor*, 71 Me. 78; *Clark v. Greeley*, 62 N. H. 304; *Olyphant v. Baker*, 5 Denio (N. Y.) 370-383; *Bissell v. Balcom*, 39 N. Y. 275, 279; *Johnson v. Elwood*, 53 N. Y. 431; *Brock v. O'Donnell*, 45 N. J. Law, 441; *Jenkins v. Jarrett*, 70 N. C. 255; *Sweeney v. Owsley*, 14 B. Mon. (Ky.) 413; *Barrow v. Window*, 71 Ill. 214; *Bertelson v. Bower*, 81 Ind. 512; *Powers v. Dellinger*, 54 Wis. 389, 11 N. W. 597; *Rail v. Lumber Co.*, 47 Minn. 422, 50 N. W. 471; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Thompson v. Brannin*, 94 Ky. 490, 21 S. W. 1057; *Levasseur v. Cary* (Me.) 3 Atl. 461; *Noah v. Pierce*, 85 Mich. 70, 48 N. W. 277; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Thompson v. Brannin*, 94 Ky. 490, 21 S. W. 1057; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 South. 20; *Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519; *Richardson v. Insurance Co.*, 136 N. C. 314, 48 S. E. 733; *Baker v. McDonald* (Neb.) 104 N. W. 923, 1 L. R. A. (N. S.) 474.

²¹ *Scudder v. Bradbury*, 106 Mass. 422, 427; *Goodwin v. Railroad Co.*, 111 Mass. 487, 489; *Riley v. Wheeler*, 42 Vt. 528; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Pickett v. Cloud*, 1 Bailey (S. C.) 362; *Wabash Elevator Co. v. Bank*, 23 Ohio St. 311; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190; *Allen v. Hartfield*, 76 Ill. 358; *Fenelon v. Hogoboom*, 31 Wis. 172, 176; *Southwestern Freight & Cotton Press Co. v. Stannard*, 44 Mo. 71, 100 Am. Dec. 255; *Beauchamp v. Archer*, 58 Cal. 431, 41 Am. Rep. 266; 2 Kent, Comm. 497; *post*, p. 268.

²² *Copland v. Bosquet*, 4 Wash. C. C. (U. S.) 588, Fed. Cas. No. 3,212; *Turner v. Moore*, 58 Vt. 455, 3 Atl. 467; *Bergan v. Magnus*, 98 Ga. 514, 25 S. E. 570. See, also, *Com. v. Devlin*, 141 Mass. 423, 6 N. E. 64.

and in some cases a stipulation that the buyer shall pay cash or give a note or other security for the price may be interpreted as indicating such an intention,²³ while in other cases such an intention may be indicated by other circumstances.²⁴

In many of the cases, where it is said that the property does not pass, however, the question involved was, not whether the property had passed, but whether the buyer had the right to possession, and consequently had acquired a complete title. It is true, of course, that unless credit is given the buyer does not acquire a complete title until payment, since until payment he has not the right to possession; and even where the seller delivers the goods, if he does so upon the understanding, express or implied, that he is to receive immediate payment, the delivery is conditional only, and if such payment be not made he has the right to reclaim the goods.²⁵ In such cases it is

²³ *Whitney v. Eaton*, 15 Gray (Mass.) 225; *Young v. Manufacturing Co.*, 23 Fla. 394, 2 South. 817; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40, 21 N. E. 49; *Adams v. Lumber Co.*, 159 N. Y. 176, 53 N. E. 805; *Bonham v. Hamilton*, 66 Ohio St. 82, 63 N. E. 597.

"The terms of the sale were 'cash or a bankable note,' and this fact is to be considered in determining whether the parties intended a completed sale. If by the use of these terms the parties understood merely that no credit was to be given, and that the seller would insist on his right to retain possession of the hay until the price was paid or secured, the sale might still be so far completed and absolute that the property would pass; but, if it was the understanding that the hay was to remain the property of the seller until the price was paid or secured, the sale was conditional, and the title would not pass, even on delivery, without performance of the condition. * * * Upon the facts stated in the case, a referee has found that the title to the hay did not vest in the defendant at the time of the auction sale. There was evidence upon which he could find either way, and his finding is not open to revision, no error of law appearing." *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450. And see cases cited in note 25, *infra*.

²⁴ *Paul v. Reed*, 52 N. H. 136; *Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457; *Flashback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235; *Kerr v. Henderson*, 62 N. J. Law, 724, 42 Atl. 1073.

²⁵ *Haskins v. Warren*, 115 Mass. 514, 534, per Wells, J.; *Goodwin v. Railroad Co.*, 111 Mass. 487, 489; *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 435, 7 Am. Dec. 392; *Leven v. Smith*, 1 Denio (N. Y.) 571; *Hayden v. Demets*, 53 N. Y. 426, 431; *Morey v. Medbury*, 10 Hun (N. Y.) 540; *Allen v. Hartfield*, 76 Ill. 358, 361; *Fenelon v. Hogoboom*,

sometimes said that the property has not passed, when it was only necessary to determine that the delivery was conditional upon payment, and hence that the buyer had not acquired the right to possession and a perfect title.²⁶

Rule 2.—Goods to be Put in Deliverable State.

Although an agreement for the sale of a specific chattel is prima facie an executed sale, the presumption may, as we have seen, be rebutted; and, if it appears that the parties have agreed that the property shall pass on the performance of a condition, the property will not pass until the condition is performed; and, if nothing has occurred in the meantime to defeat the transfer, it will then take place. When the parties have not expressed their intention clearly, it must be collected from the whole agreement. The rule now under consideration, as well as rule 3, of which there is no trace in the reports be-

31 Wis. 172, 176; *Riley v. Wheeler*, 42 Vt. 528, 532. See, also, *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Whitney v. Eaton*, 15 Gray (Mass.) 225; *Hirschorn v. Canney*, 98 Mass. 149; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 Me. 580; *Peabody v. Maguire*, 79 Me. 572, 573, 12 Atl. 630; *Paul v. Reed*, 52 N. H. 136; *Dows v. Kidder*, 84 N. Y. 121; *Harris v. Smith*, 3 Serg. & R. (Pa.) 20; *Lester v. McDowell*, 18 Pa. 91; *Wabash Elevator Co. v. Bank*, 23 Ohio St. 311; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; 2 Kent, Comm. 497; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40, 21 N. E. 49; *Johnson-Brinkham Commission Co. v. Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Wilson & Wallace v. Comer*, 125 Ga. 500, 54 S. E. 355. As to conditional delivery, see *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 560, and cases cited in preceding note. In many of these cases it is said that the "property" had not passed, and in some of them it is clear that it had not, either because at the time of the bargain the goods were not in a deliverable state or were not specific, or because delivery was to be made by the buyer at a particular place, or for some other reason; while in others it is clear that it must have been held, had the question been raised, that the risk of loss was by the contract cast upon the buyer, and hence that the property passed. In all such cases, where the question is simply whether the buyer acquired a good "title," it is immaterial to determine whether the sale was conditional, or whether only the delivery was conditional, since in either case the title of the buyer is conditional upon payment. See *Benj. Sales* (Corbin's 6th Am. Ed.) § 318 et seq.

²⁶ Post, p. 130.

fore the time of Lord Ellenborough, appear to have been adopted from the civil law.²⁷

Blackburn observes that the first rule* is founded in reason. Inasmuch as it is for the benefit of the seller that the property should pass and the risk of loss be thereby transferred from the seller, who may still retain possession of the goods as security for the price, it is reasonable that, where the seller is bound to do something before he can call upon the buyer to accept the goods, the intention of the parties should be presumed to be that the seller is to do the thing before obtaining the benefit of the transfer.²⁸ The rule is firmly established both in England²⁹ and in America.³⁰ Thus, in the case of trees to be trimmed,³¹ cotton to be ginned and baled,³² fish to be dried,³³ grain to be threshed,³⁴ hops to be baled,³⁵ or animals to be fattened,³⁶ by the seller, the doing of that thing is presumptively

²⁷ Blackb. Sales, 174.

*Blackburn's first rule,—here Rule 2.

²⁸ Blackb. Sales, 175; Benj. Sales, § 318 et seq. The presumption yields to evidence of a contrary intention. *Young v. Matthews*, L. R. 2 C. P. 127; *Barber v. Thomas*, 66 Kan. 463, 71 Pac. 845.

²⁹ *Rugg v. Minett*, 11 East, 210; *Acraman v. Morrice*, 8 C. B. 449, 19 Law J. C. P. 57; *Tansley v. Turner*, 2 Scott, 238, 2 Blng. N. C. 151; *Boswell v. Kilborn*, 15 Moore, P. C. 309, 8 Jur. 443; *Seath v. Moore*, 11 App. Cas. 350, 370. The English act requires notice to the buyer that the act has been done. Sale of Goods Act, § 18, rule 2. But the decisions in this country do not add this qualification.

³⁰ *Elgee Cotton Cases*, 22 Wall. (U. S.) 180, 188, 22 L. Ed. 863; *Foster v. Ropes*, 111 Mass. 10; *Sumner v. Hamlet*, 12 Pick. (Mass.) 76, 82; *North Pacific Lumbering & Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595; *Malone v. Stone Co.*, 36 Minn. 325, 31 N. W. 170 (payment of storage charges); *Cunningham Iron Co. v. Manufacturing Co. (C. C.)* 80 Fed. 878; *Larkin v. Johnson*, 8 Kan. App. 114, 54 Pac. 690; *James Smith Woolen Mach. Co. v. Holden*, 73 Vt. 396, 51 Atl. 2; *Backhaus v. Buells*, 43 Or. 558, 73 Pac. 342; See Sales Act, § 19, rule 2. Cf. Sale of Goods Act, § 18, rule 2. See, also, cases cited in the succeeding notes to this paragraph.

³¹ *Acraman v. Morrice*, 8 C. B. 449, 19 Law J. C. P. 57.

³² *Elgee Cotton Cases*, 22 Wall. (U. S.) 180, 193, 22 L. Ed. 863; *Bond v. Greenwald*, 4 Helsk. (Tenn.) 453.

³³ *Foster v. Ropes*, 111 Mass. 10.

³⁴ *Groff v. Belche*, 62 Mo. 400; *Thompson v. Conover*, 32 N. J. Law, 466.

³⁵ *Keeler v. Vandervere*, 5 Lans. (N. Y.) 313.

³⁶ *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. 1146.

a condition precedent to the transfer of the property. And if the parties contract for the sale of an unfinished chattel, as a partly-built carriage or ship, in the absence of anything to show a contrary intention, the property will not pass until the chattel is completed.³⁷ It is also within the principle of this rule that, if the goods are to be delivered by the seller at a particular place, the property will not pass until delivery,³⁸ unless a contrary intention is expressed³⁹ or is inferable from other circumstances, such as the payment of the price.⁴⁰ But the fact that something is to be done to the goods by the seller after delivery will not prevent the property from passing,⁴¹ unless a different intention appears.⁴²

Rule 3.—Price to be Ascertained by Weighing, Measuring, or Testing.

Blackburn states the rule,⁴³ that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, etc., the performance of that thing is a condition precedent to the transfer of the property, thus stating the rule, not as one of presumption, but as an absolute rule; and he regards it as hastily

³⁷ *Halterline v. Rice*, 62 Barb. (N. Y.) 593; *Pritchett v. Jones*, 4 Rawle (Pa.) 280. As to contracts for chattels to be manufactured by the seller, see post, p. 180.

³⁸ *Calcutta & B. S. Nav. Co. v. De Mattos*, 32 Law J. Q. B. 322, 335, per Cockburn, C. J.; *The Venus*, 8 Cranch (U. S.) 253, 275, 3 L. Ed. 553; *Sult v. Woodhall*, 113 Mass. 391; *Sneathen v. Grubbs*, 88 Pa. 147; *Devine v. Edwards*, 101 Ill. 138; *Miller v. Seaman*, 176 Pa. 291, 35 Atl. 134; *Northern Pacific Lumbering & Mfg. Co. v. Ker-ron*, 5 Wash. 214, 31 Pac. 595.

³⁹ *Lynch v. O'Donnell*, 127 Mass. 311.

⁴⁰ *Weld v. Came*, 98 Mass. 152; *Terry v. Wheeler*, 25 N. Y. 520; *Bethel Steam-Mill Co. v. Brown*, 57 Me. 9, 18, 99 Am. Dec. 572; *Lingham v. Eggleston*, 27 Mich. 324, 329; *Rail v. Lumber Co.*, 47 Minn. 422, 50 N. W. 471; *Penley v. Bessey*, 87 Me. 530, 33 Atl. 21; *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232; *Morris v. Winn*, 98 Ga. 482, 25 S. E. 562; *Lynch v. Daggett*, 62 Ark. 502, 37 S. W. 227; *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222.

⁴¹ *Hammond v. Anderson*, 1 Bos. & P. (N. R.) 69; *Graves v. Hepke*, 2 Barn. & Ald. 131; *Mount Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Morrow v. Reed*, 30 Wis. 81.

⁴² *Kitson Mach. Co. v. Holden*, 74 Vt. 104, 52 Atl. 271.

⁴³ Blackburn's second rule.

adopted from the civil law, where it was a logical deduction from the principle that there could be no sale until the price was fixed.⁴⁴ But the Court of Exchequer, in 1863, reviewed the English authorities,⁴⁵ and concluded that the rule should be modified by confining it to acts to be done by the seller, and that it is to be regarded merely as a rule of presumption, thus bringing it within the principle of the second rule.⁴⁶

The rule is generally laid down in the United States as one of presumption, sometimes without confining it to acts to be done by the seller,⁴⁷ though sometimes confining it to acts to be done by the seller or by the seller in connection with the buyer.⁴⁸ In some cases it has been confined to acts to be done by the seller.⁴⁹

It is to be observed, however, that in many of the cases which declare the rule the weighing, measuring, or testing was necessary, not merely to ascertain the price, but to ascertain the goods by separating them from a larger mass, and the property could not pass because the goods were not specif-

⁴⁴ Blackb. Sales, 175.

⁴⁵ *Hanson v. Meyer*, 6 East, 614; *Zagury v. Furnell*, 2 Camp. 240; *Withers v. Lyss*, 4 Camp. 237; *Simmons v. Swift*, 5 Barn. & C. 857; *Logan v. Le Mesurier*, 6 Moore, P. C. 116.

⁴⁶ *Turley v. Bates*, 2 Hurl. & C. 200, 33 Law J. Exch. 43; Chalm. Sale of Goods Act (6th Ed.) 49. The point was not necessary to the decision of *Turley v. Bates*. Cf. *Martineau v. Kitching*, L. R. 7 Q. B. 436.

Sale of Goods Act, § 18, rule 3, so provides, adding the requirement of notice to the buyer.

⁴⁷ *Macomber v. Parker*, 13 Pick. (Mass.) 175, 183; *Riddle v. Var-num*, 20 Pick. (Mass.) 280; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Sherwin v. Mudge*, 127 Mass. 547; *Smart v. Batchelder*, 57 N. H. 140; *Nesbit v. Burry*, 25 Pa. 208; *Nicholson v. Taylor*, 31 Pa. 128, 72 Am. Dec. 728; *Frost v. Woodruff*, 54 Ill. 155; *Rosenthal v. Kahn*, 19 Or. 571, 24 Pac. 989; *Gibbs v. Benjamin*, 45 Vt. 124; *Wesoloski v. Wysoski*, 186 Mass. 495, 71 N. E. 982.

⁴⁸ *Elgee Cotton Cases*, 22 Wall. (U. S.) 180, 188, et seq., 22 L. Ed. 803; *Lingham v. Eggleston*, 27 Mich. 324; *Boswell v. Green*, 25 N. J. Law, 390, 308; *Haxall v. Willis*, 15 Gratt. (Va.) 434, 442; *McClung v. Kelley*, 21 Iowa, 508, 511; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *H. M. Tyler Lumber Co. v. Charlton*, 128 Mich. 290, 87 N. W. 268, 55 L. R. A. 301, 92 Am. St. Rep. 452; *Parman v. Marshall* (Tenn.) 51 S. W. 116.

⁴⁹ *Burke v. Shannon*, 43 S. W. 223, 19 Ky. Law Rep. 1170.

ic.⁵⁰ At best the fact that the price remains to be ascertained affords little reason for inferring an intention that the property shall not pass; and in some jurisdictions the rule is not recognized, but it is held, as in other cases where there is an unconditional contract for the sale of goods in a deliverable state, that the property passes unless a different intention appears.⁵¹ The Sales Act omits the rule.⁵²

In jurisdictions where the rule prevails, if the goods are actually delivered, it is held that this shows an intention to complete the sale; and in such case a provision that they are to be weighed, measured, or tested will not prevent the property from passing.⁵³ And, if they have been weighed, measured, or tested, the mere arithmetical calculation of the price is immaterial.⁵⁴

Where the property has passed, so that the goods are at the risk of the buyer, but the goods are destroyed, and consequently

⁵⁰ See *Joyce v. Adams*, 8 N. Y. 297; *Smart v. Batchelder*, 57 N. H. 140; *Martin v. Hurlbut*, 9 Minn. 142 (Gil. 132); *Rosenthal v. Kahn*, 19 Or. 571, 24 Pac. 989; post, p. 147.

⁵¹ *Sanger v. Waterbury*, 116 N. Y. 371, 22 N. E. 404; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Boaz v. Schneider*, 69 Tex. 123, 6 S. W. 402; *Lassing v. James*, 107 Cal. 343, 40 Pac. 534; *Young v. Minkler*, 14 Colo. App. 204, 59 Pac. 622; *Allen v. Rushford*, 72 Neb. 907, 101 N. W. 1028. And see *Farmers' Phosphate Co. v. Gill*, 60 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. Rep. 443; *Lobdell v. Horton*, 71 Mich. 681, 40 N. W. 28; *Allen v. Elmore*, 121 Iowa, 241, 96 N. W. 769. Cf. *Kein v. Tupper*, 52 N. Y. 550.

⁵² See Sales Act, § 19. Cf. Sale of Goods Act, § 18, rule 3.

⁵³ *Macomber v. Parker*, 13 Pick. (Mass.) 175, 183; *Riddle v. Varnum*, 20 Pick. (Mass.) 280; *Odell v. Railroad Co.*, 109 Mass. 50; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42; *Boswell v. Green*, 25 N. J. Law, 390; *Scott v. Wells*, 6 Watts & S. (Pa.) 357, 40 Am. Dec. 568; *Leonard v. Davis*, 1 Black (U. S.) 476, 483, 17 L. Ed. 222; *Upson v. Holmes*, 51 Conn. 500; *Baldwin v. Doubleday*, 59 Vt. 7, 8 Atl. 576; *Haxall v. Willis*, 15 Grat. (Va.) 434, 445; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Cunningham v. Ashbrook*, 20 Mo. 553; *Morrow v. Reed*, 30 Wis. 81; *Foster v. Magill*, 119 Ill. 75, 8 N. E. 771; *Sedgwick v. Cottingham*, 54 Iowa, 512, 6 N. W. 738; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11.

The property passes, if such is the intention, although the necessary acts have not been done. *Mayberry v. Mill Co.*, 112 Tenn. 564, 85 S. W. 401.

⁵⁴ *Tansley v. Turner*, 2 Bing. N. C. 151; *Bradley v. Wheeler*, 44 N. Y. 495; *Welch v. Spies*, 106 Iowa, 389, 72 N. W. 548.

the price cannot be ascertained by weighing, or measuring, in the manner agreed, the weight or quantity may be ascertained in some other way, and the buyer may recover the price.⁵⁵

RESERVATION OF RIGHT OF POSSESSION OR PROPERTY.

44. Where there is a contract for the sale of specific goods, the seller may by the terms of the contract reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or of property may be thus reserved, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.⁵⁶

In General.

As we have seen, where there is a contract for the sale of specific goods the property in them is transferred to the buyer at such time as the parties intend it to be transferred.⁵⁷ By the terms of the contract the property may pass when the contract is made, and in such case the transfer of the property may be, and generally is, subject to the seller's lien; that is, the seller may reserve the right of possession in the goods until payment of the price.⁵⁸ As a rule the seller loses this right when he delivers the goods to the buyer.⁵⁹ Again, by the express or implied terms of the contract the seller may reserve the property in the goods until certain conditions shall have been fulfilled,⁶⁰ and this notwithstanding the delivery of the goods to the buyer.⁶¹ "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the

⁵⁵ *Martineau v. Klitching*, L. R. 7 Q. B. 436, 455 (per Blackburn, J.); *Upton v. Holmes*, 51 Conn. 500; *Sedgwick v. Cottingham*, 54 Iowa, 512, 6 N. W. 738; *Gill v. Benjamin*, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619; *Allen v. Elmore*, 121 Iowa, 241, 96 N. W. 769.

⁵⁶ See Sales Act, § 20 (1).

⁵⁹ Post, p. 317.

⁵⁷ Ante, p. 119.

⁶⁰ Ante, p. 125.

⁵⁸ Ante, p. 122.

⁶¹ Post, p. 133.

property will not pass until the condition is fulfilled, even though the goods may have been actually delivered into the possession of the buyer."⁶²

So, notwithstanding the delivery of the goods to a carrier for the purpose of transmission to the buyer, the seller may reserve the property in the goods, or may reserve the right to possession, as in the case of shipments C. O. D.⁶³ The cases involving the transfer of the property upon delivery of the goods to a carrier are generally cases where the goods were not specific, and goods were subsequently appropriated to the contract, and the question was whether the seller by the terms of the appropriation had reserved the property or right of possession; but where the contract is for the sale of specific goods to be paid for on delivery, the property in which is reserved by the contract, the question whether the seller has retained the property or the right to possession, notwithstanding delivery of the goods to a carrier for transmission to the buyer, depends upon the same considerations.⁶⁴

The commonest condition precedent to the passing of the property is the payment of the price. Such a condition may be expressed, or it may be implied from the circumstances.⁶⁵

Where Property and Right to Possession are to Pass on Payment.

As a rule, where no such condition is expressed, if the goods are specific and in a deliverable state, and a different intention does not appear, the property in the goods passes when the contract is made, although the seller is entitled to retain possession, unless credit is given, until the price is paid.⁶⁶ But an intention that the property, as well as the right to possession, shall not pass until payment, may be indicated by the conduct of the parties and the circumstances of the case; and in some cases a stipulation that the goods are to be paid for, either in cash, or by note, or by acceptance, upon delivery, has been held to indicate such an intention.⁶⁷ In all cases where such

⁶² Benj. Sales, § 320.

⁶³ Post, p. 157.

⁶⁴ Post, p. 162.

⁶⁵ Silsby v. Railroad Co., 176 Mass. 158, 57 N. E. 370; ante, p. 123.

⁶⁶ Ante, p. 121.

⁶⁷ Ante, p. 124.

an intention appears, the property will pass only upon payment, unless the condition has been waived.⁶⁸

It is, of course, competent for the seller to waive the condition, and, since payment and delivery are concurrent and mutually dependent acts,⁶⁹ an unconditional delivery by the seller without payment is a waiver of the condition.⁷⁰ If, however, the delivery is conditional—that is, if it is accompanied by a reservation of the property until payment—the condition is not waived. To constitute a conditional delivery, it is not necessary that the seller should declare the condition in express terms; but it is sufficient if the intent of the parties can be inferred from their acts and the circumstances of the case. Hence, if the delivery is made with the expectation that the price will be shortly paid, or the contemplated security given,

⁶⁸ *Bishop v. Shillito*, 2 Barn. & Ald. 329, note a. And see cases cited in note 25, *supra*, and notes 70, 75, *infra*.

⁶⁹ Post, p. 268.

⁷⁰ *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Upton v. Cotton Mills*, 111 Mass. 446; *Wigton v. Bowley*, 130 Mass. 252; *Peabody v. Maguire*, 79 Me. 572, 585, 12 Atl. 630; *Paul v. Reed*, 52 N. H. 136; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Smith v. Lynes*, 5 N. Y. 41; *Parker v. Baxter*, 86 N. Y. 586; *Cole v. Berry*, 42 N. J. Law, 308, 36 Am. Rep. 511; *Bowen v. Burk*, 13 Pa. 146; *Mackanness v. Long*, 85 Pa. 158; *Thompson v. Wedge*, 50 Wis. 642, 7 N. W. 560; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *Warder, Mitchell & Co. v. Hoover*, 51 Iowa, 491, 1 N. W. 795; *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S. E. 183; *Wheeler & Wilson Mfg. Co. v. Bank*, 105 Ga. 57, 31 S. E. 48; *Hirsch v. Lumber Co.*, 69 N. J. Law, 509, 55 Atl. 645.

"The important question, in determining whether there has been a waiver of a condition of sale, is: Has the vendor manifested, by his language or conduct, an intention or willingness to waive the condition and make the delivery unconditional and the sale absolute, without having received payment or the performance of the conditions of sale? This must depend on the intent of the parties at the time, to be ascertained from their conduct and language, and not from the mere fact of delivery alone. Whether there has been a waiver is a question of fact. It may be proved by various species of evidence—by declarations, by acts, or by forbearance to act. But, however proved, the question is: Has the vendor voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition?" *Fishback v. Van Dusen*, *supra*, per Mitchell, J. And see *George W. Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712. See, also, *Lewenbergh v. Hayes*, 91 Me. 104, 39 Atl. 469, 64 Am. St. Rep. 215.

the delivery will ordinarily be conditional, because there is an implied understanding that the buyer will act honestly, and take the goods subject to the contract. In such case, if the payment or security is omitted, evaded, or refused by the buyer upon getting possession, the seller may immediately reclaim the goods;⁷¹ and he may enforce this right against the buyer's attaching creditor⁷² or assignee in bankruptcy,⁷³ or against an innocent purchaser from the buyer.⁷⁴

Unconditional delivery of the goods to a carrier or other bailee for the purpose of transmission to the buyer is equivalent to delivery to the buyer, and is a waiver of the condition;⁷⁵ but the seller may reserve the property in the goods, or the right of possession, notwithstanding such delivery, by indicating his intention at the time of the shipment.⁷⁶

So-Called "Conditional Sales."

There is a class of transactions, commonly called "conditional sales," where by the express terms of the contract the possession of the goods is to be delivered to the buyer, but the property in them is to remain in the seller until payment of the price. These contracts usually provide for the time of payment, and the price is often payable in installments, and they are sometimes called "installment contracts." They are to be distinguished from those contracts, considered in the preceding paragraph, in which the condition is, indeed, that the property shall not pass until payment, but which contemplate that payment is to be made upon delivery.⁷⁷ The term "conditional sale" is misleading, for the transaction is not a sale, but a contract to sell. The distinguishing features of these contracts are that they confer upon the buyer the right to

⁷¹ Ante, p. 124.

⁷² *Peabody v. McGuire*, 79 Me. 572, 12 Atl. 630.

⁷³ *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235.

⁷⁴ *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. But see *Oomer v. Cunningham*, 77 N. Y. 891, 33 Am. Rep. 626.

⁷⁵ *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

⁷⁶ Post, p. 162.

⁷⁷ See *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 231, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.

possession and use of the goods upon prescribed terms, usually until default in payment, while reserving in the seller the property in the goods as security for payment.⁷⁸

"Conditional Sale" Distinguished from Other Transactions.

A "conditional sale" differs from a bailment with an option to buy, in that the buyer is bound to pay the price.⁷⁹ It differs from a mortgage, in that the property is not transferred.⁸⁰ In many respects, indeed, a conditional sale is analagous to a sale with a mortgage back to secure the price;⁸¹ but the two transactions are distinct.⁸² At the same time it is often difficult to determine whether a particular transaction is a conditional sale, or whether it is a lease, or an absolute sale with a reservation of a lien or mortgage to secure the price. The character of the transaction depends upon the intention of the parties, which is evidenced in most cases by a written contract, and which is not determined by the name which the parties have given to the instrument, but is to be gathered from all its terms.⁸³ Thus instruments in the form of leases, and so designated, and providing that the so-called lessee shall become the owner of the thing leased upon payment of stipulated installments of rent, usually equivalent to the value of the thing, which the lessee agrees to pay, and reserving the right on the part of the lessor upon default in payment to resume possession, have often been held to be conditional sales.⁸⁴ And in-

⁷⁸ See *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.

⁷⁹ Ante, p. 8.

⁸⁰ Ante, p. 9.

⁸¹ Post, p. 140. See 20 Harv. Law Rev. 371-372, 378-380.

In some jurisdictions conditional sales are held to be subject to the provisions of a statute requiring chattel mortgages to be filed or recorded. *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *In re Ducker*, 134 Fed. 43, 67 O. C. A. 117 (Kentucky law); *Clark v. Bright*, 30 Colo. 199, 69 Pac. 506.

⁸² See, *Harkness v. Russell*, supra; *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1110; *Gilbert v. Cash Register Co.*, 176 Ill. 288, 52 N. E. 22; *Freed Furniture & Carpet Co. v. Sorensen*, 28 Utah, 419, 79 Pac. 564, 107 Am. St. Rep. 731.

⁸³ *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22.

⁸⁴ *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Sing-*

struments in the form of leases have been held to be sales with a reservation of lien or mortgage back to secure the price, where the intention was manifest that the property should pass with such reservation.⁸⁵ And, on the other hand, the same construction has been placed in some cases upon instruments in the form of conditional sales, where such in substance appeared to be the transaction contemplated.⁸⁶

Effect of Conditional Sale.

Under a conditional sale, notwithstanding the delivery of possession, the property does not pass to the buyer until the condition of payment is performed.⁸⁷ And, where the question is unaffected by statute, the buyer cannot pass title to others, either to his attaching creditor⁸⁸ or to bona fide purchasers.⁸⁹

er Mfg. Co. v. Cole, 4 Lea (Tenn.) 439, 40 Am. Rep. 20; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Gerrish v. Clark*, 64 N. H. 492, 13 Atl. 970; *Cowan v. Manufacturing Co.*, 92 Tenn. 376, 21 S. W. 663; *Quinn v. Machinery Co.*, 5 Wash. 276, 31 Pac. 866; *Campbell v. Atherton*, 92 Me. 66, 42 Atl. 232; *Lundy Furniture Co. v. White*, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; *Wilcox v. Cherry*, 123 N. C. 79, 31 S. E. 369; *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 881; *Unitype Co. v. Long*, 143 Fed. 315, 74 O. C. A. 453.

⁸⁵ *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160. See, also, *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; *Singer Mfg. Co. v. Smith*, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897. Cf. *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455.

⁸⁶ *Chicago Railway Equipment Co. v. Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146; *A. H. Andrews & Co. v. Bank*, 20 Colo. 313, 36 Pac. 902; *O. Aultman & Co. v. Silha*, 85 Wis. 359, 55 N. W. 711.

⁸⁷ *Ex parte Crawcour*, 9 Ch. Div. 419; *Campbell Printing Press & Mfg. Co. v. Walker*, 114 N. Y. 7, 20 N. E. 625; *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 803; *Cincinnati Safe Co. v. Kelly*, 54 Ark. 476, 16 S. W. 263; *Bunday v. Machine Co.*, 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475.

If a note is given in conditional payment, the property does not pass. *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 637, 33 L. Ed. 125; *Triplett v. Implement Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284.

⁸⁸ *Hussey v. Thornton*, 4 Mass. 405, 3 Am. Dec. 224; *Forbes v. Marsh*, 15 Conn. 384; *Mack v. Story*, 57 Conn. 407, 18 Atl. 707; *Armington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366; *Rogers v. Whitehouse*,

⁸⁹ See note 89 on following page.

"The vendee in such cases," said the court in a leading case,** "acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the

71 Me. 222; *Strong v. Taylor*, 2 Hill (N. Y.) 326; *Herring v. Hoppock*, 15 N. Y. 409; *Cole v. Mann*, 62 N. Y. 1; *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631; *Call v. Seymour*, 40 Ohio St. 670; *Dewes Brewery Co. v. Merritt*, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; *City Nat. Bank v. Tufts*, 63 Tex. 113; *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448.

** *Harkness v. Russell*, 118 U. S. 668, 7 Sup. Ct. 51, 30 L. Ed. 285; *Zuchtmann v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663; *Ballard v. Burgett*, 40 N. Y. 314 (cf. *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626); *Weeks v. Pike*, 60 N. H. 447; *Sanders v. Keber*, 28 Ohio St. 630; *Sumner v. Cottey*, 71 Mo. 121; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104; *McComb v. Donald's Adm'r*, 82 Va. 903, 5 S. E. 558; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544, 33 Pac. 360; *Marvin Safe Co. v. Norton*, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 566; *Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403; *Gill v. De Armant*, 90 Mich. 425, 51 N. W. 527; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 South. 729; *Triplett v. Implement Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; *Lorain Steel Co. v. Railway Co.*, 187 Mass. 500, 73 N. E. 646; *Freed Furniture & Carpet Co. v. Sorensen*, 28 Utah, 419, 79 Pac. 564, 107 Am. St. Rep. 731; *Studebaker Bros. Co. v. Man*, 13 Wyo. 353, 80 Pac. 151, 110 Am. St. Rep. 1001; *Id.*, 14 Wyo. 68, 82 Pac. 2.

It is otherwise where the buyer is expressly or impliedly authorized to sell. *Winchester Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382; *Spooner v. Cummings*, 151 Mass. 313, 23 N. E. 839; *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 19 South. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550.

The seller may by his acts be estopped from asserting title. *Mississippi River Logging Co. v. Miller*, 109 Wis. 77, 85 N. W. 193.

** *Coggill v. Railroad Co.*, 3 Gray (Mass.) 545, per Bigelow, J.

parties to a conditional sale and delivery. Any other rule would be equal to a denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy." In several states, however, a different view of the policy of the law is entertained, and it is held that if the seller delivers the goods to the buyer, so as to clothe him with apparent ownership, a bona fide purchaser from the buyer or his execution creditor is entitled to protection as against the claim of the seller.⁹¹ In many states, among them some in which the validity of conditional sales as against creditors and purchasers had been sustained by the courts, statutes regulating conditional sales have been passed. These statutes usually provide that the contract shall be void as against purchasers and creditors unless in writing and filed or recorded like a chattel mortgage.⁹²

But, although the property does not pass, the buyer acquires a defeasible interest, which before breach of condition he may

⁹¹ *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455; *Vanduzor v. Allen*, 90 Ill. 499; *Hervey v. Locomotive Works*, 93 U. S. 684, 23 L. Ed. 1003 (involving the Illinois rule); *Lincoln v. Quynn*, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446 (bona fide purchaser protected. Cf. *Central Trust Co. v. Manufacturing Co.*, 77 Md. 202, 26 Atl. 493); *Greer v. Church*, 13 Bush (Ky.) 430; *In re Ducker*, 134 Fed. 43, 67 C. C. A. 117 (Kentucky law).

In Pennsylvania a distinction is drawn between a conditional sale and a bailment with an option to purchase during the bailment or at its termination. In the latter case it is held, as in other jurisdictions, that the ownership of the bailor is protected against creditors of the bailee and purchasers from him. *Rowe v. Sharp*, 51 Pa. 26; *Goss Printing Co. v. Jordan*, 171 Pa. 474, 32 Atl. 1031. But in the case of a conditional sale it is held, anomalously, that delivery to the buyer subjects the goods to execution at the suit of his creditors and makes it transferable to bona fide purchasers from him. *Haak v. Linderman*, 64 Pa. 499, 3 Am. Rep. 612; *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102.

In Colorado it seems that creditors without notice and bona fide purchasers from the buyer are protected. *Jones v. Clark*, 20 Colo. 353, 38 Pac. 371.

⁹² Such a statute has been held not to apply to a conditional delivery under a cash sale. *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Hirsch v. Lumber Co.*, 69 N. J. Law. 509, 55 Atl. 845. And see *Plymouth Stove Foundry Co. v. Fee*, 182 Mass. 31, 64 N. E. 419.

sell or mortgage,⁹³ and which is subject to attachment by his creditors,⁹⁴ and which upon the performance of the condition becomes perfect. "The vendee acquires, not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title of the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale."⁹⁵ And, like other bailees, he may maintain an action of trover against one who wrongfully invades his possession.⁹⁶ The seller also may sell or mortgage his interest in the goods or in the contract, and it may be attached by his creditors.⁹⁷

Remedies of Seller under Conditional Sale.

Upon default in payment or in performance of any other condition of the contract, the right of possession reverts in

⁹³ Day v. Bassett, 102 Mass. 445; Chase v. Ingalls, 122 Mass. 381; Carpenter v. Scott, 13 R. I. 477; Nutting v. Nutting, 63 N. H. 221. See Winchester v. King, 46 Mich. 102, 8 N. W. 722; Sunny South Lumber Co. v. Lumber Co., 63 Ark. 268, 38 S. W. 902; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719.

⁹⁴ Newhall v. Kingsbury, 131 Mass. 445; Denny v. Eddy, 22 Pick. (Mass.) 535; Hurd v. Fleming, 34 Vt. 169; Hervey v. Diamond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673. Contra: Keck v. State, 12 Ind. App. 119, 39 N. E. 809. But the seller may retain the right to possession notwithstanding delivery. Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519.

⁹⁵ Carpenter v. Scott, *supra*.

⁹⁶ Harrington v. King, 121 Mass. 269; Lord v. Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933. Cf. Smith v. Gufford, 36 Fla. 481, 18 South. 717, 51 Am. St. Rep. 37.

⁹⁷ Burnell v. Marvin, 44 Vt. 277; Everett v. Hall, 67 Me. 497; McMillan v. Larned, 41 Mich. 521, 2 N. W. 662; Ross-Meehan Brake-Shoe Co. v. Ice Co., 72 Miss. 608, 18 South. 364; Landigan v. Mayer, 32 Or. 245, 51 Pac. 649, 67 Am. St. Rep. 521; Standard Steam Laundry v. Dole, 22 Utah, 311, 61 Pac. 1103; Spoon v. Frambach, 83 Minn. 301, 86 N. W. 106; Bank of Little Rock v. Collins, 66 Ark. 240, 50 S. W. 694; Nye v. Daniels, 75 Vt. 81, 53 Atl. 150; Cutting v. Whittemore, 72 N. H. 107, 54 Atl. 1098; Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623.

the seller,⁹⁸ and he may retake the goods or maintain an action of replevin to recover them.⁹⁹ By his mere default, however, the buyer does not forfeit his rights under the contract, for before possession is retaken the buyer may still pay the price and retain the goods.¹⁰⁰ And the seller may waive the default,¹⁰¹ as by allowing the buyer to remain in possession and extending the time of performance, or accepting part payment of the price; and if he does so he cannot resume possession without demand for performance and refusal by the buyer to comply with it.¹⁰²

In a conditional sale, since the price is payable irrespective of the transfer of the property, the seller may maintain an action for the price, although the property has not passed.¹⁰³ But, if he brings an action for the price, it is generally held that he has elected to treat the sale as absolute, and that he

⁹⁸ *Hubbard v. Bliss*, 12 Allen (Mass.) 590.

⁹⁹ *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Salomon v. Hathaway*, 126 Mass. 482; *Hughes v. Kelly*, 40 Conn. 148; *Stone v. Perry*, 60 Me. 48; *Whitney v. McConnell*, 29 Mich. 12; *Wiggins v. Snow*, 89 Mich. 476, 50 N. W. 991; *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638; *Richardson Drug Co. v. Teasdale*, 52 Neb. 698, 72 N. W. 1028; *Wilmerding v. Furniture Co.*, 122 Ga. 312, 50 S. E. 100; *Worthington v. A. G. Rhodes & Son Co.*, 145 Ala. 656, 39 South. 614; *National Cash Register Co. v. Petsas* (Wash.) 86 Pac. 662.

Some cases require a demand. *New Home Sewing-Mach. Co. v. Bothane*, 70 Mich. 443, 38 N. W. 326; *Nattin v. Riley*, 54 Ark. 30, 14 S. W. 1100.

¹⁰⁰ *Vaughn v. McFayden*, 110 Mich. 234, 68 N. W. 135; *Nattin v. Riley*, *supra*.

After default by the buyer, and demand of possession and tender back of unpaid notes by the seller, the buyer can no longer assign his interest. *Lippincott v. Rich*, 19 Utah, 140, 56 Pac. 806.

¹⁰¹ *Cole v. Hines*, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455.

¹⁰² *Hutchings v. Munger*, 41 N. Y. 155; *O'Rourke v. Hadcock*, 114 N. Y. 541, 22 N. E. 33; *People's Furniture & Carpet Co. v. Crosby*, 57 Neb. 282, 77 N. W. 658, 73 Am. St. Rep. 504; *Mosby v. Goff*, 21 R. I. 494, 44 Atl. 930; *Cable Co. v. Wasegizig*, 130 Mich. 387, 90 N. W. 24.

¹⁰³ *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381. He may sue for each installment as it falls due. *Gray v. Booth*, 64 App. Div. 231, 71 N. Y. Supp. 1015. See Sales Act, § 63 (2); 20 Harv. Law Rev. 378-381; *post*, p. 348.

cannot afterwards reclaim the goods.¹⁰⁴ On principle, however, it seems that the maintenance of an action for the price is not inconsistent with the retention of the property in the seller, since by the terms of the contract the property is to remain in him until the price is paid, and the reservation of the property is for the very purpose of securing payment, and that the seller should be allowed to sue for the price and also to reclaim the goods to make them available as security; and some cases so hold.¹⁰⁵ Conversely, it is generally held that, if the seller reclaims the goods, he cannot afterwards sue for the price;¹⁰⁶ but on principle the mere resumption of possession is not inconsistent with the exercise of the right under the contract to recover the price, and some cases so hold.¹⁰⁷ It is gen-

¹⁰⁴ *Balley v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 448, 18 L. R. A. 187, 36 Am. St. Rep. 323; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Richards v. Schrelber, Conchar & Westphal Co.*, 98 Iowa, 422, 67 N. W. 569; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014; *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008; *Alden v. W. J. Dyer & Bro.*, 92 Minn. 134, 99 N. W. 784; *Dowaglac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703.

¹⁰⁵ *Campbell Printing Press & Mfg. Co. v. Publishing Co.*, 56 N. J. Law, 676, 29 Atl. 681, 44 Am. St. Rep. 410; *Jones v. Snider*, 99 Ga. 276, 25 S. E. 668; *Thomason v. Lewis*, 103 Ala. 426, 15 South. 830; *E. E. Forbes Piano Co. v. Wilson*, 144 Ala. 586, 39 South. 645.

If the seller attaches or levies on execution upon the goods, this is a recognition of the buyer's ownership, and an election. *Tanner & De Laney Engine Co. v. Hall*, 89 Ala. 630, 7 South. 187; *Fuller v. Eames*, 108 Ala. 464, 19 South. 366; *Albright v. Meredith*, 58 Ohio St. 194, 50 N. E. 719.

So if the seller attempts to establish a materialman's lien. *Hickman v. Richburg*, 122 Ala. 638, 26 South. 136. Cf. *Warner Elevator Mfg. Co. v. Loan Ass'n*, 127 Mich. 323, 86 N. W. 828, 89 Am. St. Rep. 473; *Bierce v. Hutchins*, 205 U. S. 840, 27 Sup. Ct. 524, 51 L. Ed. 828 (April 8, 1907). See 20 Harv. Law Rep. 371, 372.

¹⁰⁶ *Seanor v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; *Earle v. Robinson*, 91 Hun, 863, 38 N. Y. Supp. 178, affirmed 157 N. Y. 683, 51 N. E. 1090; *White v. A. W. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481; *Perkins v. Grobben*, 116 Mich. 172, 74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512; *C. Aultman & Co. v. Olson*, 43 Minn. 409, 45 N. W. 852; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 135, 76 N. W. 1028.

¹⁰⁷ *Tufts v. D'Arcambal*, 85 Mich. 185, 48 N. W. 497, 12 L. R. A.

erally held that the seller need not, in an action against the buyer or a purchaser from him to recover the value of the goods upon their conversion, allow for partial payments,¹⁰⁸ or, in replevin, refund the same,¹⁰⁹ and that, although the seller reclaims the goods, the buyer cannot recover for installments paid.¹¹⁰ But some courts refuse to enforce the harsh rule of forfeiture of the installments paid,¹¹¹ and other courts, upon equitable principles, where the court has equitable powers, require the seller to account for payments received.¹¹² In some states the matter is regulated by statute.¹¹³

Risk of Loss.

As a rule the risk of loss attaches to the ownership of the goods,¹¹⁴ and unless otherwise agreed they remain at the seller's risk until the property in them is transferred to the buyer, so that, if they are destroyed or injured before the transfer, he cannot recover the price;¹¹⁵ but when the property

446, 24 Am. St. Rep. 79; *Dederick v. Wolfe*, 68 Miss. 500, 9 South. 350, 24 Am. St. Rep. 283; *McPherson v. Lumber Co.*, 70 Miss. 649, 12 South. 857; *McCormick Harvesting Mach. Co. v. Koch*, 8 Okl. 374, 58 Pac. 626. And see *Tufts v. Brace*, 103 Wis. 341, 79 N. W. 414.

¹⁰⁸ *Angier v. Manufacturing Co.*, 1 Gray (Mass.) 621, 61 Am. Dec. 436; *Morgan v. Kidder*, 55 Vt. 367; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *Lorain Steel Co. v. Railway Co.*, 187 Mass. 500, 73 N. E. 646. But see *Johnston v. Whittemore*, 27 Mich. 463.

¹⁰⁹ *Duke v. Shackelford*, 56 Miss. 552; *Fleck v. Warner*, 25 Kan. 492. If the buyer has equities by reason of installments paid, they cannot be asserted in replevin brought by the seller after condition broken. *Thirlby v. Rainbow*, 93 Mich. 164, 53 N. W. 150; *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370.

¹¹⁰ *Latham v. Summer*, 89 Ill. 233, 31 Am. Rep. 79 (but see *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517); *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592.

¹¹¹ *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559.

¹¹² *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Gullford v. McKinley*, 61 Ga. 230; *Snook v. Raglan*, 89 Ga. 251, 15 S. E. 364; *A. D. Puffer & Sons Mfg. Co. v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682.

¹¹³ *Well v. State*, 46 Ohio St. 450, 21 N. E. 643; *Whitelaw Furniture Co. v. Boon*, 102 Tenn. 719, 52 S. W. 155; *Matteson v. Milling Co.*, 143 Cal. 436, 77 Pac. 144.

¹¹⁴ See *Martineau v. Kitching*, L. R. 7 Q. B. 436, per Blackburn, J.; 9 Harv. Law Rev. 106.

¹¹⁵ *Keln v. Tupper*, 52 N. Y. 550; *Lingham v. Eggleston*, 27 Mich.

is transferred they are the buyer's risk, whether delivery has been made or not.¹¹⁶ So goods delivered on approval are at the seller's risk,¹¹⁷ while goods delivered on sale or return are at the risk of the buyer.¹¹⁸ The parties may, however, fix the risk by agreement.¹¹⁹

Where goods are delivered upon a conditional sale, the property being reserved in the seller, many cases hold, in accordance with the general rule, that the goods remain at the seller's risk, and that, if they are lost or injured without the buyer's fault before payment, the buyer is not bound to pay the price.¹²⁰ Upon a conditional sale, however, the buyer ordinarily receives all the incidents of ownership except the title, the transaction being analogous to an absolute sale with a mortgage back to secure the price;¹²¹ and many cases therefore hold that the goods are at the risk of the buyer, who has the beneficial interest.¹²² In accordance with this view, which is supported by the weight of authority, the proposed Sales Act provides: "Where delivery of the goods has been made to

324; *Drews v. Logging Co.*, 53 Minn. 199, 54 N. W. 1110; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Porter v. Bridgers*, 132 N. C. 92, 43 S. E. 551.

If the buyer has paid the price, and the goods are destroyed, he may recover it. *Joyce v. Adams*, 8 N. Y. 291; *Slade v. Lee*, 94 Mich. 127, 53 N. W. 929; *Stone v. Waite*, 88 Ala. 599, 7 South. 117.

¹¹⁶ *Terry v. Wheeler*, 25 N. Y. 520; *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592; ante, p. 123. See Sales Act, § 22.

¹¹⁷ *Elphick v. Barnes*, 5 C. P. Div. 321; post, p. 144.

¹¹⁸ *Carter v. Wallace*, 32 Hun (N. Y.) 384; *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208; *Foley v. Feirath*, 98 Ala. 176, 18 South. 485, 39 Am. St. Rep. 39; post, p. 145.

¹¹⁹ *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Inglis v. Stock*, 10 App. Cas. 263.

¹²⁰ *Randle v. Stone & Co.*, 77 Ga. 501; *Gilsson v. Heggie*, 105 Ga. 30, 31 S. E. 118; *Swallow v. Emery*, 111 Mass. 355; *Wolf v. Di Lorenzo*, 21 Misc. Rep. 521, 47 N. Y. Supp. 719; *J. M. Arthur & Co. v. Blackman (C. C.)* 63 Fed. 536; *Bishop v. Minderhout*, 128 Ala. 162, 29 South. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134; *American Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 South. 218.

¹²¹ Ante, p. 134.

¹²² *Tufts v. Griffin*, 107 N. C. 49, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; *Burnley v. Tufts*, 66 Miss. 49, 5 South. 627, 14 Am. St. Rep. 540; *Tufts v. Wynne*, 45 Mo. App. 42; *Osborn v. Lumber Co.*, 91 Wis. 526, 65 N. W. 184; *American Soda Fountain Co. v.*

the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."¹²³

SALE ON APPROVAL OR TRIAL.

45. When goods are delivered to the buyer on approval, or on trial, or on satisfaction, or other similar terms, unless a different intention appears, the property there-in passes to the buyer—

- (a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.
- (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.¹²⁴

Vaughn, 69 N. J. Law, 582, 55 Atl. 54; *La Valley v. Ravenna*, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, 112 Am. St. Rep. 898.

In *La Valley v. Ravenna*, supra, the court said: "The defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for, the use, possession, and enjoyment of the property, with the right to acquire the absolute title upon payment of the stipulated price, and this was the consideration for his promise. The seller had done all that he was to do to or with the property by the terms of the contract—all that he was to do at all, except to receive the price; and upon that the title passed, without further action on the part of either party. The defendant's promise was in no sense conditioned on the seller's ability to deliver the title. He could not return the property to the seller, and thereby avoid further liability."

¹²³ Sales Act, § 22 (a). Section 22 (b), following the English Sales Act, § 20, provides also: "Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in default as regards any loss which might not have occurred but for such default."

¹²⁴ Sales Act, § 19, rule 3 (2).

SALE OR RETURN.

46. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods, instead of paying the price, unless a different intention appears, the property passes to the buyer on delivery; but he may revert the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.¹²⁵

Sale on Approval.

Conditions postponing the transfer of the property may exist for the benefit of the buyer as well as of the seller. Instances of such conditions are afforded in sales "on trial," or "on approval," or "on satisfaction."¹²⁶ Such a transaction amounts to a bailment, with the right in the buyer to convert the bailment into a sale, at his option.¹²⁷ In such cases there is no sale until the buyer signifies to the seller his approval or acceptance, or does some act adopting the transaction as a sale.¹²⁸ If he does not signify his approval or acceptance, but retains the goods without giving notice of rejection, it is generally held that the property passes on the expiration of the time limited for trial,¹²⁹ or, if no time is limited, on the expira-

¹²⁵ Sales Act, § 19, rule 3 (1).

¹²⁶ Post, p. 234.

¹²⁷ Ante, p. 8.

¹²⁸ *Swain v. Shepherd*, 1 *Moody & R.* 223; *Elphick v. Barnes*, 5 *C. P. Div.* 321, 326; *Hunt v. Wyman*, 100 *Mass.* 198; *Whitehead v. Vanderbilt*, 10 *Daly (N. Y.)* 214; *Pitts' Sons Mfg. Co. v. Poor*, 7 *Ill. App.* 24; *Mowbray v. Cady*, 40 *Iowa*, 604; *Pierce v. Cooley*, 56 *Mich.* 552, 23 *N. W.* 310; *Glasscock v. Hazell*, 109 *N. C.* 145, 13 *S. E.* 789; *Davis Gasoline Engine Works Co. v. McHugh*, 115 *Iowa*, 415, 88 *N. W.* 948; *In re George M. Hill Co.*, 123 *Fed.* 866, 59 *C. C. A.* 354. See also, *O'Donnell v. Wing & Son*, 121 *Ga.* 717, 49 *S. E.* 720.

¹²⁹ *Humphries v. Carvalho*, 16 *East*, 45; *Elphick v. Barnes*, 5 *C. P. Div.* 321; *Waters Heater Co. v. Mansfield*, 48 *Vt.* 878; *Butler v. School Dist.*, 149 *Pa.* 351, 24 *Atl.* 308; *Spickler v. Marsh*, 36 *Md.* 222; *Delamater v. Chappell*, 48 *Md.* 244, 253; *Prairie Farmer Co. v. Taylor*, 69 *Ill.* 440, 18 *Am. Rep.* 621; *Aultman v. Theiler*, 34 *Iowa*, 272; *Columbia Rolling-Mill Co. v. Machine Co.*, 55 *N. J. Law*, 391, 28 *Atl.* 888; *Turner v. Foundry Co.*, 97 *Mich.* 166, 56 *N. W.* 856; *Grabfelder*

tion of a reasonable time,¹³⁰ although some cases hold that failure to return is merely evidence of intention on the buyer's part to exercise his right to purchase.¹³¹

Sale or Return.

A bailment with an option in the bailee to buy is, however, essentially different from a sale with the right of return. It is, of course, competent for the parties to agree that the property in the goods shall pass to the buyer on delivery, and that, if he does not approve of the goods, he may return them. In the latter case the transaction is a sale defeasible on the fulfillment of a condition subsequent.¹³² The property vests in the buyer, and, upon the exercise of his right of return, it reverts in the seller. To have this effect, the option must be exercised within the time fixed,¹³³ or, if no time be fixed, within a reasonable time.¹³⁴ In case the buyer disables himself from performing, the sale becomes absolute.¹³⁵ The difficulty lies in ascertaining the intention, and different constructions would probably be placed upon the same transaction by different

v. Vosburgh, 90 App. Div. 307, 85 N. Y. Supp. 633. A sale on condition that the buyer may return on a certain contingency becomes absolute if he disables himself from performing the condition by mortgaging the goods. *Lynch v. Willford* (Minn.) 59 N. W. 311. Using a harvesting machine for a day after deciding to return it was a waiver of the right to return. *Palmer v. Banfield*, 86 Wis. 441, 56 N. W. 1090.

¹³⁰ *Moss v. Sweet*, 16 Q. B. 493, 20 Law J. Q. B. 167; *Dewey v. Erie Borough*, 14 Pa. 211, 53 Am. Dec. 533; *S. C. Forsalith Mach. Co. v. Mengel*, 99 Mich. 280, 58 N. W. 305.

¹³¹ *Hunt v. Wyman*, 100 Mass. 198, per Wells, J.; *Kahn v. Klambunde*, 50 Wis. 235, 6 N. W. 888. See *Sturm v. Boker*, 150 U. S. 312, 331, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 260, 68 N. E. 224.

¹³² *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187; *Schlesinger v. Stratton*, 9 R. I. 578, 580; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Robinson v. Fairbanks*, 81 Ala. 132, 1 South. 552; *Wind v. Iler*, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219; *Gay v. Dare*, 103 Cal. 454, 37 Pac. 466; *Weles v. McNeerney*, 74 Conn. 675, 51 Atl. 1064. Cf. *Head v. Tattersall*, L. R. 7 Exch. 7; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

¹³³ *Stevens v. Hertzler*, 114 Ala. 503, 22 South. 121.

¹³⁴ *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

¹³⁵ *Ray v. Thompson*, *supra*.

courts.¹⁸⁶ Thus, in several cases where goods were delivered to the buyer upon his agreement to return them on a specified day, or else to pay for them, the transaction has been construed as an executed sale with the right of return;¹⁸⁷ but it is perhaps open to doubt whether it would not be more in accordance with the intention of the parties to construe such a transaction as a bailment with the right to purchase. The terms "sale on trial," "sale on approval," and "sale or return" are often used without much distinction;¹⁸⁸ but the term "sale or return" is in this country often confined to sales defeasible upon the return of the goods, in distinction to the terms "sale on trial" and "sale on approval," which are confined to cases in which the approval of the buyer is a condition precedent to the transfer of the property;¹⁸⁹ and the distinction is a convenient one.

¹⁸⁶ *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187.

¹⁸⁷ *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630; *Buswell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262; *Crocker v. Gullifer*, 44 Me. 491, 494, 69 Am. Dec. 118; *McKinney v. Bradlee*, 117 Mass. 321; *Martin v. Adams*, 104 Mass. 262.

¹⁸⁸ Cf. *Moss v. Sweet*, 16 Q. B. 493, 20 Law J. Q. B. 167; *Meldrum v. Snow*, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; *Kahn v. Klabunde*, 50 Wis. 235, 238, 6 N. W. 888; *Spickler v. Marsh*, 36 Md. 222; *Benj. Sales*, § 595.

The English Sale of Goods Act, § 18, rule 4, does not make the distinction. See *Chalmers, Sale of Goods Act* (8th Ed.) 50.

¹⁸⁹ Cf. *Schlesinger v. Stratton*, 9 R. I. 578, 580; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Robinson v. Fairbanks*, 81 Ala. 132, 1 South. 552; *Benj. Sales* (Bennett's 6th Am. Ed.) pp. 568, 569; *Id.* (Corbin's Ed.) p. 796, note 30.

CHAPTER IV.

EFFECT OF THE CONTRACT IN PASSING THE PROPERTY (Continued)—SALE OF GOODS NOT SPECIFIC.

- 47-48. In General.
- 49-50. Subsequent Appropriation.
- 51-53. Reservation of Right of Possession or Property.

IN GENERAL.

- 47. NO PROPERTY PASSES UNTIL GOODS ARE ASCERTAINED.** Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained; but property in an undivided share of ascertained goods may be transferred as stated in the following section.¹
- 48. UNDIVIDED SHARES.** (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.
- (2) **UNIFORM MASS.** In some jurisdictions, but not in all, there may be a sale of an undivided share of a specific mass of goods of uniform character, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass.²

The rule that the parties must be agreed on the specific goods which are to be the subject of the sale is founded, as Blackburn says, on the very nature of things; for, until the parties are agreed on the specific goods, the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfill his contract by

¹ See Sales Act, § 17.

² See Sales Act, § 6.

furnishing any goods answering the description, and the buyer could not object to them, provided they answered the description, it is clear that there can be no intention to transfer the property in any particular goods.³

Where Goods are Part of Specific Stock.

But, where the goods are so far ascertained that the parties have agreed to take them from a particular stock owned by the seller, a different question may arise. If the goods are part of a specific stock, consisting of units of varying quality or value, as a number of sheep out of a flock, it is clear that a selection must take place before the property in any particular units can pass.⁴ But if the goods are part of a uniform mass, such as grain or oil or coal, so that any unit is the equivalent of any other unit, it is possible that the parties may intend that the property in an undivided share shall pass, the parties becoming owners in common of the mass; and such an intention may be inferable although the contract is not in terms for the sale of an undivided interest, as a half or a third, but where it is for the sale of a certain number of bushels or gallons or tons of the mass of grain or oil or coal, the buyer in such case to become owner of such share of the mass as the number of units bought bears to the number of units in the mass.

In England no such distinction is recognized, and the general rule is applied, even though the mass be of uniform quality and value.⁵ But in the United States, while many cases main-

³ Blackb. Sales, 124; Benj. Sales, 352; 2 Kent, Comm. 496.

⁴ Hahn v. Fredericks, 30 Mich. 223, 18 Am. Rep. 119; Steaubl v. Bank, 11 Wash. 426, 39 Pac. 814; Lighthouse v. Bank, 162 N. Y. 336, 56 N. E. 738; Wilson v. Salt Co., 50 App. Div. 114, 63 N. Y. Supp. 565; Martin Bros. & Co. v. Lesan, 129 Iowa, 573, 105 N. W. 996.

⁵ Wallace v. Breeds, 13 East, 522; Austen v. Craven, 4 Taunt. 644; White v. Wilks, 5 Taunt. 176; Busk v. Davis, 2 Maule & S. 397; Shepley v. Davis, 5 Taunt. 617; Gillett v. Hill, 2 Crompt. & M. 530; Gabarron v. Kreeft, L. R. 10 Exch. 274. See Sale of Goods Act, § 16. Whitehouse v. Frost, 12 East, 614, may, perhaps, rest upon this distinction. See Busk v. Davis, 2 Maule & S. 397. But the case has been much questioned in England. Benj. Sales, § 354. It is, however, frequently cited as an authority in the American cases which recognize the distinction.

tain strictly the older rule,⁶ others hold that if the sale be of a certain quantity, by weight or measure or count, its separation from a specific, uniform mass is not necessary to pass the property, when the intention to do so is otherwise manifested.⁷ Upon the question of intention, the payment of the price, and particularly the undertaking of the seller to hold as bailee of

⁶ *Woods v. McGee*, 7 Ohio, 127, pt. 2, 30 Am. Dec. 220 (but see *Newhall v. Langdon*, 39 Ohio St. 87, 48 Am. Rep. 426); *Scudder v. Worcester*, 11 Cnsh. (Mass.) 573; *Ropes v. Lane*, 9 Allen (Mass.) 502; *Keeler v. Goodwin*, 111 Mass. 490; *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241; *Reeder v. Machen*, 57 Md. 56; *Ferguson v. Bank*, 14 Bush (Ky.) 555; *Courtright v. Leonard*, 11 Iowa, 32; *McLaughlin v. Plattl*, 27 Cal. 451; *Dunlap v. Berry*, 4 Scam. (Ill.) 327, 39 Am. Dec. 413; *Warten v. Strane*, 82 Ala. 311, 8 South. 231; *Commercial Nat. Bank v. Gillette*, 90 Ind. 268, 46 Am. Rep. 222; *Jeraulds v. Brown*, 64 N. H. 606, 15 Atl. 123; *New England Dressed Meat & Wool Co. v. Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516; *Conard v. Railroad Co.*, 214 Pa. 98, 63 Atl. 424. See, also, *Golder v. Ogden*, 15 Pa. 528, 53 Am. Dec. 618; *Haldeman v. Duncan*, 51 Pa. 66; *Morrison v. Woodley*, 84 Ill. 192. Some cases cited as authorities on this point, perhaps, rest on the ground that the mass was not uniform. *Woods v. McGee*, supra; *Hutchinson v. Hunter*, 7 Pa. 140; *McLaughlin v. Plattl*, 27 Cal. 451 (see *Horr v. Barker*, 8 Cal. 603; *Id.*, 11 Cal. 393, 70 Am. Dec. 791). See *Stone v. Peacock*, 35 Me. 385, 388.

⁷ *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473, 18 Am. Dec. 726; *Hurff v. Hires*, 40 N. J. Law, 581, 29 Am. Rep. 282; *Chapman v. Shepard*, 89 Conn. 413; *Waldron v. Chase*, 37 Me. 414, 59 Am. Dec. 56 (but see *Morrison v. Dingley*, 63 Me. 563); *Newhall v. Langdon*, 39 Ohio St. 87, 48 Am. Rep. 426; *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. 974; *Young v. Miles*, 20 Wis. 615; *Horr v. Barker*, 8 Cal. 603; *Id.*, 11 Cal. 393, 70 Am. Dec. 791; *Kingman v. Holmquist*, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604; *Nash v. Brewster*, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409; *Mackellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222; (barrels): *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Watts v. Hendry*, 13 Fla. 523; *Wagar v. Railroad Co.*, 79 Mich. 648, 44 N. W. 1113; *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548; *O'Keefe v. Lelstikow* (N. D.) 104 N. W. 515. Where the contract was for "merchantable brick," to be sorted from the kiln by the buyer, the title did not pass; it being impossible to determine either what brick, or what relative portion of the kiln, were sold. *Kimberly v. Patchin*, supra, distinguished on the ground that it did not appear that the brick were uniform and of equal value. *Anderson v. Crisp*, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419.

the buyer, are material;⁸ and it has also been held that the delivery of the mass to the buyer, with power to make the separation, is evidence of an intention to pass the property.⁹ In some cases where an undivided interest was held to have passed it is perhaps doubtful whether such intention existed;¹⁰ but on principle there is no reason why the intention, if it exists, should not be given effect, and the doctrine that the property may pass in such cases without separation is supported by the weight of authority in this country.¹¹ The doctrine has also been applied where the contract was to sell unascertained goods and the seller appropriated to the contract out of a larger mass the specified number of units.¹²

Elevator Cases.

Analogous to the cases last mentioned are the so-called "Elevator Cases," which hold that grain delivered by the owners at

⁸ See *Foot v. Marsh*, 51 N. Y. 288.

⁹ *Page v. Carpenter*, 10 N. H. 77; *Lamprey v. Sargent*, 58 N. H. 241; *Weld v. Cutler*, 2 Gray (Mass.) 195; *Croze v. Land Co.*, 143 Mich. 514, 107 N. W. 313, 114 Am. St. Rep. 677. But see *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334, per Comstock, J., commenting on *Crofoot v. Bennett*, 2 N. Y. 258.

¹⁰ *Pleasants v. Pendleton*, 6 Rand. (Va.) 478, 18 Am. Dec. 726, a leading case, of which it was observed by Grimke, J., in *Woods v. McGee*, 7 Ohio, 127, pt. 2, 30 Am. Dec. 220, that "it was a hard case, and hard cases make shipwreck of principles."

¹¹ It is adopted by Sales Act, § 6. See, also, sections 17, 76 (fungible goods).

¹² Where defendants ordered 400 hectolitres of nuts, after being informed that they were sold in bulk by hectolitres, the buyer to furnish bags on arrival of shipment, and on arrival of steamer received a delivery order for 400 hectolitres in bulk in separate hold, and on presentation of the order found that the 400 hectolitres destined for them were embraced in a consignment of 582 hectolitres to various consignees, which was the usual method of shipment, it was held, in an action for the price, that the delivery on board vested in defendants' title to ~~400/582~~ of the consignment, and that the tender of the 582 hectolitres for defendants to take their share was a sufficient delivery. The court said: "A distinction is made between those cases where the act of separation is burdensome and expensive, or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery." *Brownfield v. Johnson*, 128 Pa. 254, 18 Atl. 543, 6 L. R. A. 48. Post, p. 282.

an elevator, and stored in a common mass, is owned by the depositors as tenants in common, and that the interest of any one of them may be transferred without separation.¹⁸ There is, however, in the Elevator Cases, this essential distinction: that the tenancy in common is created by the original deposit and mixture of goods, so that in case of a sale by one owner there can be no question that the intention is to transfer the property in an undivided interest.

SUBSEQUENT APPROPRIATION.

49. IN GENERAL. Where there is a contract for the sale of unascertained goods, the property in them is not transferred until there has been an appropriation of the goods to the contract—that is, a specification or selection, by the seller with the assent of the buyer, or by the buyer with the assent of the seller, of the goods which are to be the subject-matter of the sale; and when goods are so appropriated to the contract, with the intention of passing the property in them, the property is transferred.

50. RULES FOR ASCERTAINING INTENTION AS TO TIME WHEN PROPERTY IS TO PASS. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer:

- (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
- (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to or a holding for the buyer,

¹⁸ Cushing v. Breed, 14 Allen (Mass.) 376, 92 Am. Dec. 777; Kee-ler v. Goodwin, 111 Mass. 490; Dole v. Olmstead, 38 Ill. 150, 85 Am. Dec. 397; Id., 41 Ill. 344, 89 Am. Dec. 386; Warren v. Milliken, 57 Me. 97. Ante, p. 7.

he is presumed to have unconditionally appropriated the goods to the contract, except in the cases embraced in the following subsection and in sections 51-53. In many jurisdictions this presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery," or their equivalents; but in other jurisdictions it is held that in such cases the property does not pass until delivery to the buyer.

- (3) If a contract to sell requires the seller to deliver the goods to the buyer or at a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon.¹⁴

Although no property can pass until the goods have been ascertained, it does not necessarily follow that because they have been ascertained the property passes. The transfer of the property, in such case, as well as in the case of a contract for the sale of goods originally specific, depends solely on the intention of the parties, and, while in both cases the presumption is that the parties intend the property to pass,¹⁵ it may well happen that, though they subsequently agree upon the specific goods, they intend that the property shall remain in the seller until the performance of a condition. To effect a transfer of the property, it is necessary, not only that the goods be ascertained, but that they be appropriated to the contract with the intention of passing the property in them. The term "appropriation to the contract," as has been observed by Chalmers, J.,¹⁶ is unfortunate; for it sometimes means simply that the goods have been specified as the subject-matter of the contract, so that the seller would break it by delivering any other goods, though the property still remains in him, while, on the other hand, it may, and usually does, mean that the goods have been designated with the intention of passing the property in them to the buyer—that is, finally appropriated to the contract, so as to pass the property in them.¹⁷

¹⁴ See Sales Act, § 19, rules 4 and 5.

¹⁵ Blackb. Sales (2d Ed.) 128.

¹⁶ Chalm. Sale of Goods Act (6th Ed.) 51.

¹⁷ *Walt v. Baker*, 2 Exch. 1, 8, per Parke, B.

How Effected.

An appropriation, so as to pass the property in the goods, can only take place by the assent of both parties,¹⁸ but the assent may be implied as well as express;¹⁹ and it may be given by either party after²⁰ or before a selection by the other. When the goods are afterwards selected by the buyer with the assent of the seller, or, if selected by the seller, are approved by the buyer, no difficulty arises.²¹ As was said by Holroyd, J., "The selection of the goods by the one party, and the adoption of the act by the other, converts that which was before a mere agreement to sell into an actual sale, and the property thereby passes."²²

Appropriation by Act of Seller.

"The difficulty arises when the seller makes the selection pursuant to an authority derived from the buyer; and it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or whether they show an irrevocable determination of a right of election."²³ Authority to make the appropriation is generally conferred upon the seller by implication upon the ground that he is by the contract authorized or required to do an act in respect to the goods on behalf of the buyer which, from the nature of the act, he cannot do until the goods are appropriated.²⁴ Until he performs the act, he may change his

¹⁸ *Campbell v. Mersey Docks & Harbour Board*, 14 C. B. (N. S.) 412, per Willes, J.; *Godts v. Rose*, 17 C. B. 229, per Willes, J.; *Jenner v. Smith*, L. R. 4 C. P. 270, per Brett, J.; *Reeder v. Machen*, 67 Md. 56; *Home Ins. Co. v. Heck*, 65 Ill. 111; *Andrews v. Cheney*, 62 N. H. 404; *American Hide & Leather Co. v. Chalkley & Co.*, 101 Va. 458, 44 S. E. 705.

¹⁹ *Campbell v. Board*, 14 C. B. (N. S.) 412, per Erie, J.; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Sparkes v. Marshall*, 2 Bing. N. C. 761.

²⁰ *Rohde v. Thwaites*, 6 Barn. & C. 388.

²¹ *Benj. Sales*, § 358.

²² *Rohde v. Thwaites*, 6 Barn. & C. 388. See, also, *Hatch v. Oil Co.*, 100 U. S. 124, 136, 25 L. Ed. 554; *Augustine v. McDowell*, 120 Iowa, 401, 94 N. W. 919.

²³ *Chalm. Sale of Goods Act* (6th Ed.) 50.

²⁴ *Langd. Cas. Sales*, 1028; *Smith v. Edwards*, 156 Mass. 221, 80

mind as often as he will as to what goods he will select, for the contract gives him till then to make the choice; but, when once he has performed the act, his election is determined, and the property in the goods passes to the buyer.²⁵ Thus where, by the contract, the seller is to sell a certain number of barrels of flour, and to load them into the wagon or vessel of the buyer, who is to fetch them away, the seller has implied authority to appropriate the goods, and he may select any goods he pleases, provided they conform to the contract, and he may select first one lot, and then another, without affecting the property in them; but when once he loads the barrels into the buyer's wagon or vessel the appropriation is final, and, unless he reserves the property in the goods,²⁶ the property passes.²⁷ So when the seller is to deliver the goods at a place designated by the contract, unless a different intention appears,²⁸ the property passes upon the delivery.²⁹ An act of appropriation,

N. E. 1017, per Holmes, J.; *Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270.

Where the seller is authorized to do such an act, the implication of authority is not overcome by the fact that the sale is by sample; for the property passes only provided they do conform, and the right to refuse the goods if they do not conform to the description always exists. *Kuppenheimer v. Werthelmer*, 107 Mich. 77, 64 N. W. 952, 61 Am. St. Rep. 317; *Wadhams & Co. v. Balfour*, 32 Or. 313, 51 Pac. 642. But see *Jenner v. Smith*, L. R. 4 C. P. 270.

²⁵ Blackb. Sales, 128; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295.

²⁶ Post, p. 162.

²⁷ *Benj. Sales*, § 359; *Gill v. Benjamin*, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619 (to be delivered over the rail of the buyer's vessel). A foreign merchant contracted for several cargoes of lumber, to be delivered, seasoned, f. o. b. ship in the A. river, within seven months of May 1st; certain advances to be made before June 1st. The advances were made, and the first cargo was prepared by August, piled by itself, and the buyer notified. The buyer had difficulty in chartering ships, and the lumber was burned. Held, that the title had not passed. *Schreyer v. Lumber Co.*, 4 C. C. A. 547, 54 Fed. 653.

²⁸ *Cole v. Bryant*, 73 Miss. 297, 18 South. 655.

²⁹ *National Bank v. Dayton*, 102 U. S. 59, 28 L. Ed. 77; *Hyde v. Lathrop*, 2 Abb. Dec. 436; *Clafin v. Railroad Co.*, 7 Allen (Mass.) 341; *Veazle v. Holmes*, 40 Me. 60; *Bloyd v. Pollock*, 27 W. Va. 75; *Sedgwick v. Cottingham*, 54 Iowa, 512, 6 N. W. 738; *Brigham v. Hib-*

if authorized, is sufficient to transfer the property, even though the goods remain in the seller's control.⁸⁰ The authority to make the appropriation may, however, be withdrawn before it is exercised, and if it be afterwards acted on the seller cannot recover the price, but his remedy is by action to recover damages for non-acceptance.⁸¹

Appropriation by Delivery to Carrier.

The commonest form of appropriation by act of the seller is by the delivery of the goods to a carrier as agent for the buyer. Delivery to a carrier for transmission to the buyer, pursuant to the contract, is an appropriation of the goods to the contract, and passes the property in them, unless by the terms of the contract or appropriation the seller reserves the right of property in them, or unless he is to deliver them to the buyer at their destination, in which case the property does not pass until such delivery.⁸² Thus, if the buyer orders goods to be sent to him at his expense, and the seller delivers goods conforming to the contract to a carrier for transmission to the buyer, the appropriation is complete upon such delivery, and the property passes,⁸³ provided that the seller does not reserve

bard, 28 Or. 386, 43 Pac. 383; *Bayne v. Hard*, 77 App. Div. 251, 79 N. Y. Supp. 208, affirmed 174 N. Y. 534, 66 N. E. 1104.

⁸⁰ Where the buyer accepted by telegram the seller's offer to sell him 60 tubs of butter of a specified quality at 27 cents per pound, and they immediately set apart the butter, weighing it and marking it as his, and sent him a bill marked "cash on demand," the appropriation was authorized and passed the property. *Mitchell v. LeClair*, 165 Mass. 308, 43 N. E. 117. See, also, *Tift v. Wight & Weslosky Co.*, 113 Ga. 681, 39 S. E. 503. Cf. *Andrews v. Cheney*, 62 N. H. 404.

⁸¹ *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788.

⁸² Sales Act, § 19, rules 4, 5.

⁸³ *Fragano v. Long*, 4 Barn. & C. 219; *Browne v. Hare*, 4 Hurl. & N. 822, 29 Law J. Exch. 6; affirming 3 Hurl. & N. 484, 27 Law J. Exch. 372; *Tregelles v. Sewell*, 7 Hurl. & N. 574; *Calcutta & B. S. Nav. Co. v. De Mattos*, 32 Law J. Q. B. 322, 328, per Blackburn, J.; *Finch v. Mansfield*, 97 Mass. 89; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Odell v. Railroad Co.*, 109 Mass. 50; *Frank v. Hoey*, 128 Mass. 263; *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017; *Torrey v. Corliss*, 33 Me. 333; *Arnold v. Prout*, 51 N. H. 587; *Hobart v. Littlefield*, 13 R. I. 341; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Bailey v. Railroad Co.*, 49 N. Y. 70; *Pacific Iron Works v.*

the property.⁸⁴ The right to make the appropriation springs from the authority to deliver to the carrier as agent for the buyer, which is equivalent to delivery to him personally, and such authority may either be conferred by the express terms of the contract, or may be implied from the course of trade. If, however, the seller is to deliver to the buyer at the place of destination, unless a different intention appears, delivery to the carrier is not delivery to him as agent of the buyer, but as agent of the seller, and hence does not pass the property.⁸⁵

Railroad Co., 62 N. Y. 272; *Schmertz v. Dwyer*, 53 Pa. 335; *Philadelphia & R. Ry. v. Wireman*, 88 Pa. 264; *Kelsea v. Manufacturing Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; *Watkins v. Paine*, 57 Ga. 50; *Pilgreen v. State*, 71 Ala. 868; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Ellis v. Roche*, 73 Ill. 280; *Ranney v. Higby*, 4 Wis. 154; *Sarbecker v. State*, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624; *Garretson v. Selby*, 37 Iowa, 529, 18 Am. Rep. 14; *Burton v. Baird*, 44 Ark. 556; *Dyer v. Railway Co.*, 51 Minn. 345, 53 N. W. 714, 38 Am. St. Rep. 506; *Wind v. Iler*, 93 Iowa, 310, 61 N. W. 1001, 27 L. R. A. 219; *Nelmeyer Lumber Co. v. Railroad Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *Mobile Fruit & Trading Co. v. McGuire*, 81 Minn. 232, 83 N. W. 833; *Althouse v. McMillan*, 132 Mich. 145, 92 N. W. 941; *Samuel M. Lawder & Sons Co. v. Grocery Co.*, 97 Md. 1, 54 Atl. 634; *P. J. Bowlin Liquor Co. v. Beaudoin* (N. D.) 108 N. W. 545; *Lombard Water-Wheel Governor Co. v. Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180.

⁸⁴ Post, p. 162.

⁸⁵ *Calcutta & B. S. Nav. Co. v. De Mattos*, 82 Law J. Q. B. 322, per Blackburn, J.; *Dunlop v. Lambert*, 6 Clark & F. 600, per Lord Cottenham; *Sult v. Woodhall*, 113 Mass. 391; *McNeal v. Braun*, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441; *Bloyd v. Pollock*, 27 W. Va. 75; *Congar v. Railroad Co.*, 17 Wis. 477; *Braddock Glass Co. v. Irwin*, 153 Pa. 440, 25 Atl. 490. Some cases hold that it is not enough to overcome the presumption that the property passes on delivery to the carrier. *Mee v. McNider*, 109 N. Y. 500, 17 N. E. 424; *Nelmeyer Lumber Co. v. Railroad Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534. Contra: *Devine v. Edwards*, 101 Ill. 138.

Sales Act, § 19, rule 5, provides: "If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." That the seller is to pay the freight is evidence of an intention that the property does not pass on delivery to the carrier. *Sult v. Woodhall*, 113 Mass. 391; *Berger v. State*, 50 Ark. 20, 6 S. W. 15; *McLaughlin v.*

Whether delivery to the carrier in pursuance of an order to that effect from the buyer, with directions to collect the price on delivery to the buyer, or, as the transaction is usually designated, "shipment C. O. D.," operates as a transfer of the property is a question on which the authorities differ. On the one hand, it is held that in such a case the carrier is the seller's agent, and hence that the property does not pass until delivery by the carrier to the buyer;⁸⁸ but other cases hold that the condition as to payment is intended merely to reserve the

Marston, 78 Wis. 670, 47 N. W. 1058; Havens v. Fuel Co., 41 Neb. 153, 59 N. W. 681; Hunter Bros. Milling Co. v. Kramer Bros., 71 Kan. 468, 80 Pac. 963.

F. O. B. A stipulation that the seller shall deliver the goods "f. o. b."—that is, "free on board"—at a place named means that he is to pay the cost of transportation to that place. Sheffield Furnace Co. v. Coke Co., 101 Ala. 446, 14 South. 672. If the goods are to be "f. o. b." at the initial point of transportation, the seller must pay the expenses up to and including loading on board. See Sheffield Furnace Co. v. Coal & Coke Co., *supra*; Congdon v. Kendall, 53 Neb. 282, 73 N. W. 659; Samuel M. Lawder & Sons Co. v. Grocery Co., 97 Md. 1, 54 Atl. 634; Benj. Sales (5th Eng. Ed.) 683. If the goods are to be shipped "f. o. b." at the place of destination, the seller is to pay the freight or cost of transportation to that place, and, unless a different intention appears, the property will not pass until the goods reach their destination. Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Capehart v. Improvement Co., 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; Alabama Nat. Bank v. Parker & Co., 146 Ala. 513, 40 South. 967; Hunter Bros. Milling Co. v. Kramer Bros., 71 Kan. 468, 80 Pac. 963. Cf. Knapp Electrical Works v. Wire Co., 157 Ill. 456, 42 N. E. 147.

In Nelmeyer Lumber Co. v. Railroad Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534, it was held that "prices f. o. b. Omaha" did not mean that the delivery should take place at Omaha. As to the meaning of "f. o. b. cars," see Vogt v. Schlenebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989; Davis v. Cement Co. (C. C.) 134 Fed. 274, affirmed 142 Fed. 74, 73 C. C. A. 388; Elliott v. Howison, 146 Ala. 568, 40 South. 1018; Hurst v. Manufacturing Co., 73 Kan. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928.

⁸⁸ State v. O'Neill, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557 (see, also, dissenting opinion of Harlan, J., in O'Neill v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, in which a writ of error was dismissed on the ground that no federal question was involved); Lane v. Chadwick, 146 Mass. 68, 15 N. E. 121; Baker v. Bourcicault, 1 Daly (N. Y.) 23; U. S. v. Shriver (D. C.) 23 Fed. 134; Wagner v. Hallack, 3 Colo. 176.

seller's lien for the price, and that the delivery of the goods to the carrier, being made in pursuance of the instructions of the buyer, passes the property.³⁷ The latter view, which appears to be supported by the weight of authority, is adopted by the proposed Sales Act.³⁸

Other Forms of Appropriation by Act of Seller.

Appropriation by the act of the seller may take place even before the goods are forwarded, as where they are to be sent in sacks furnished by the buyer. Under such circumstances, unless the seller reserves the property, the appropriation is complete, and the property passes as soon as the seller puts the goods into the sacks.³⁹

Another common form of appropriation by act of the seller is where, in pursuance of the contract, he incorporates his own materials with the property of the buyer, as where a carpenter is employed to repair a chattel or to erect a building on land of his employer. As soon as the incorporation takes place, the property in the materials passes; but up to that moment the carpenter has the right to use any materials he sees fit, and the mere fact that he has selected materials with the intention of incorporating them confers upon the employer no right of property in them.⁴⁰

³⁷ *Com. v. Fleming*, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763; *Higgins v. Murray*, 73 N. Y. 252, *semble*; *State v. Intoxicating Liquors*, 73 Me. 278; *Pilgreen v. State*, 71 Ala. 368; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Hunter v. State*, 55 Ark. 357, 18 S. W. 374; *Norfolk S. R. Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611; *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 836; *State v. Peters*, 91 Me. 31, 39 Atl. 342; *James v. Commonwealth*, 102 Ky. 108, 42 S. W. 1107; *City of Carthage v. Duvall*, 202 Ill. 234, 66 N. E. 1099; *City of Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Keller v. State* (Tex. Cr. App.) 87 S. W. 669, 1 L. R. A. (N. S.) 489.

³⁸ Sales Act, § 19, rule 4 (2).

³⁹ *Aldridge v. Johnson*, 7 El. & Bl. 885, 26 Law J. Q. B. 296; *Langton v. Higgins*, 4 Hurl. & N. 402, 28 Law J. Exch. 252. In *Ogg v. Shuter*, 1 C. P. Div. 47, reversing L. R. 10 C. P. 159, it was held that, by taking a bill of lading to his own order, the seller reserved the right of disposal, notwithstanding the fact that he had put the goods in the buyer's sacks.

⁴⁰ *Tripp v. Armitage*, 4 Mees. & W. 687; *Wood v. Bell*, 6 El. & Bl. 355, affirming 5 El. & Bl. 772; *Seath v. Moore*, 11 App. Cas. 350, 381;

Seller must Act in Conformity with Authority.

Where the appropriation is to be made by the seller, no property in the goods selected by him will pass unless he exercises his authority in conformity with the contract. Thus no property will pass if the goods do not conform to the description,⁴¹ or unless he ships the goods within the time specified,⁴² or in the manner specified,⁴³ or unless he delivers to the carrier designated, if a particular carrier be designated by the contract,⁴⁴ or if he delivers to a carrier where transmission by carrier is not within the agreement.⁴⁵ Again, no property will pass if he sends a greater quantity of goods than the buyer has ordered; and if he does so there must be a subsequent acceptance by the buyer, in order to pass the property.⁴⁶

Johnson v. Hunt, 11 Wend. (N. Y.) 135; *Wilkins v. Holmes*, 5 Cush. (Mass.) 147; *Langd. Cas. Sales*, 1029.

⁴¹ *Wait v. Baker*, 2 Exch. 1, per Parke, B.; *Vigers v. Sanderson* (1901) 1 Q. B. 608; *Gardner v. Lane*, 12 Allen (Mass.) 39 (cf. *Id.*, 9 Allen [Mass.] 492, 85 Am. Dec. 779; *Id.*, 98 Mass. 517); *Wolf v. Dietzsch*, 75 Ill. 206; *Brown v. Berry*, 14 N. H. 459; *Aultman, Miller & Co. v. Clifford*, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; *New England Dressed Meat & Wool Co. v. Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516. The buyer may elect to keep the goods. *Graff v. D. M. Osborne Co.*, 56 Kan. 162, 42 Pac. 705.

Where a tender of the goods under such an appropriation is rejected, the seller may within the contract time appropriate other goods. *Borrowman v. Free*, 4 Q. B. Div. 500.

⁴² *Rommel v. Wingate*, 103 Mass. 327. Where the order requires shipment on a specified day, shipment before the day does not pass the property. *Hoover v. Maher*, 51 Minn. 269, 53 N. W. 646; *Crane v. Wilson*, 105 Mich. 554, 63 N. W. 506.

The buyer may waive the delay, and assent to the subsequent appropriation. *Alexander v. Gardner*, 2 Bing. N. C. 671.

⁴³ *Jones v. Schneider*, 22 Minn. 279.

⁴⁴ *Wheelhouse v. Parr*, 141 Mass. 598, 6 N. E. 787.

⁴⁵ *Hague v. Porter*, 8 Hill (N. Y.) 141.

⁴⁶ *Cunliffe v. Harrison*, 6 Exch. 903; *Downer v. Thompson*, 2 Hill (N. Y.) 137 (cf. *Id.*, 6 Hill [N. Y.] 208); *Rommel v. Wingate*, 103 Mass. 327; *Barton v. Kane*, 17 Wis. 38; *Bailey v. Smith*, 43 N. H. 141; *Comstock v. Sanger*, 51 Mich. 497, 16 N. W. 872. Where earthenware was ordered, and additional earthenware, entirely different, was sent in the same crate, held, that the property had not passed. *Levy v. Green*, 1 El. & El. 969, 28 Law J. Q. B. 819. Some American cases hold that the seller "may satisfy the contract by tendering a greater quantity, from which the buyer may select, provid-

So if the quantity of goods is contracted for as an undivided whole, as a cargo or a boatful, the property in the goods will not pass until the whole quantity is put on board,⁴⁷ even though the vessel is the vessel of the buyer.⁴⁸

Appropriation by Act of Buyer.

Although cases in which authority to make the appropriation is conferred on the buyer are comparatively rare, the same principle applies to him as to the seller, if by the contract an act which necessarily determines the selection is to be performed by the buyer. For example, suppose that by the contract the seller sells out of a stack of bricks 1,000, to be selected by the buyer, who is to send his cart and fetch them away. Here the buyer may choose first one part of the stack, and then another, until he has done the act determining his election; that is, until he has put the bricks into his cart. When he has done that, his election is determined, and he cannot put back the bricks and take others from the stack.⁴⁹

Goods Made to Order.

Where a chattel is made to order out of the materials of the maker, it seems, on principle, that the ordinary rule should apply; that is, that unless the maker is authorized or required to do in respect to it, after it is completed, some act necessarily involving its appropriation to the contract—for example, to forward it to the buyer—the property will not pass until it is accepted by him.⁵⁰ In making the chattel, as in procuring

ed the mass does not vary in quality." *Benj. Sales* (Corbin's 6th Am. Ed.) §§ 512, 531. This is said to be a sequence from *Kimberly v. Patchin*, supra, and other cases holding that where the goods sold are part of a specific bulk, of uniform character, the property in an undivided part may be transferred without separation. Ante, p. 149; post, p. 282.

⁴⁷ *Anderson v. Morice*, L. R. 10 C. P. 609, affirmed 1 App. Cas. 713. Cf. *Colonial Ins. Co. v. Insurance Co.*, 12 App. Cas. 128.

⁴⁸ *Rochester & O. Oil Co. v. Hughey*, 56 Pa. 322; *Hays v. Packet Co.* (D. C.) 33 Fed. 552.

⁴⁹ *Benj. Sales*, § 359; *Valentine v. Brown*, 18 Pick. (Mass.) 549. Cf. *Inhabitants of Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.

⁵⁰ Although the property does not vest in the buyer on completion, it passes upon his assent to its appropriation to the contract. *Wilkins v. Bromhead*, 6 Man. & G. 963.

goods in any other way to fulfill a contract, the seller is acting for himself, and not for the buyer, and he can satisfy his contract equally well by making and tendering another chattel within the stipulated time as by tendering the chattel first made. This view has been sustained in England, and in many of the courts of this country;⁵¹ but in others it is held that the property passes as soon as the seller finishes the chattel, and sets it apart for the buyer.⁵²

Chattel to be Paid for in Installments as Work Progresses.

In shipbuilding contracts, where it is provided that the payments shall be made in installments at particular stages in the progress of the work, a peculiar rule of construction has been adopted in England, by which the parties are held, by implication, to have evinced an intention that the property in the uncompleted vessel shall pass on the payment of the first installment.⁵³ It follows that, as new materials are incorporated in the unfinished vessel, they become the property of the buyer. This rule of construction has not met with approval in the United States, and it is generally⁵⁴ held that the intention of

⁵¹ *Mucklow v. Mangles*, 1 Taunt. 818; *Atkinson v. Bell*, 8 Barn. & C. 277; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Tufts v. Grever*, 83 Me. 407, 22 Atl. 382; *Shaw v. Smith*, 48 Conn. 306, 40 Am. Rep. 170; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176; *Scudder v. Steamboat Co.*, 1 Cliff. (U. S.) 370, 378, Fed. Cas. No. 12,565, per Clifford, J.; *Butterworth v. McKinly*, 11 Humph. (Tenn.) 206, per Totten, J.; *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117; *Haynes v. Quay*, 134 Mich. 229, 95 N. W. 1082. See *Whitcomb v. Whitney*, 24 Mich. 486; *Pratt v. Peck*, 70 Wis. 620, 36 N. W. 410; *Langd. Cas. Sales*, 1029. Such cases appear to fall within Sales Act, § 19, rule 4, being "future goods." See *Benj. Sales* (5th Eng. Ed.) 366. Post, p. 348.

⁵² *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Ballentine v. Robinson*, 46 Pa. 177; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Higgins v. Murray*, 4 Hun (N. Y.) 565; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210. See, also, *West Jersey Ry. Co. v. Car-Works Co.*, 32 N. J. Law, 517; *Gordon v. Norris*, 40 N. H. 370; *Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303. Post, p. 348.

⁵³ *Woods v. Russell*, 5 Barn. & Ald. 942; *Clarke v. Spence*, 4 Adol. & E. 448. See, also, *Seath v. Moore*, 11 App. Cas. 350, 380; *Reid v. MacBeth* (1904) App. Cas. 223. Cf. *Laidler v. Burlinson*, 2 Mees. & W. 602.

⁵⁴ The English rule was followed in *Scudder v. Steamboat Co.*, 1 TIFF. SALES (2D ED.)—11

the parties as to the time when the property is to be transferred is to be determined, as in other cases, from the terms of the contract and the circumstances of the transaction.⁵⁵ Therefore, unless a contrary intention appears, the ordinary rule will prevail—that no property passes before the chattel is completed.⁵⁶

RESERVATION OF RIGHT OF POSSESSION OR PROPERTY.

51. IN GENERAL. When there is a contract for the sale of unascertained goods, and goods are subsequently appropriated to the contract, the seller may, by the terms of the appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.*

52. BY BILL OF LADING. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller *prima facie* reserves the property in the goods; but where by the bill of lading the goods are deliverable to the buyer or his agent, or to the order of the buyer or his agent, *prima facie* the property in the goods passes to the buyer.

53. DEALING WITH BILL OF LADING TO SECURE PRICE. When, upon shipment, the seller takes a bill of lading and deals with it so as to secure the contract price,

Cliff. (U. S.) 370, Fed. Cas. No. 12,565, and *Sandford v. Ferry Co.*, 27 Ind. 522.

⁵⁵ *Clarkson v. Stevens*, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139, affirming *Stevens v. Shippen*, 29 N. J. Eq. 602.

⁵⁶ *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Williams v. Jackman*, 16 Gray (Mass.) 514; *Briggs v. Light Boat*, 7 Allen (Mass.) 287; *Wright v. Tetlow*, 99 Mass. 397; *Elliott v. Edwards*, 35 N. J. Law, 265, *Edwards v. Elliott*, 36 N. J. Law, 449, 13 Am. Rep. 463; *Derbyshire's Estate*, 81 Pa. 18; *Green v. Hall*, 1 Houst. (Del.) 506; *Hall v. Green*, 1 Houst. (Del.) 546, 71 Am. Dec. 96; *In re Carter*, 21 App. Div. 118, 47 N. Y. Supp. 383; *Yukon River Steamboat Co. v. Gratto*, 136 Cal. 538, 69 Pac. 252.

*See Sales Act, § 20 (1).

either by sending to an agent the bill of lading, with a bill of exchange drawn on the buyer for the price, with instructions to deliver the bill of lading only on acceptance or payment of the bill of exchange, or by transferring the bill of lading as security to a banker who has discounted the bill of exchange, the property in the goods does not pass to the buyer until acceptance or payment of the bill of exchange, or tender of the price, as the case may be. And, if the seller transmits the bill of exchange and bill of lading to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby.

The rule that the seller who delivers goods to a carrier in pursuance of authority derived from the buyer is presumed thereby to appropriate the goods unconditionally to the contract, like other rules for determining when the property has passed, is simply a rule of construction adopted for the purpose of ascertaining the real intention of the parties, which they have failed to express.⁵⁷ And therefore, if it appears that the seller, though authorized to make such appropriation, has by the terms of the appropriation reserved the property in the goods, the presumption must yield to the facts.⁵⁸ The commonest way of reserving the property is by means of the bill of lading.⁵⁹

Right of Disposal.

Where goods are delivered to a carrier, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the carrier as bailee for delivery to the person indicated by the bill of lading.⁶⁰ When, therefore, the seller ships the goods which he intends to deliver under the contract, by taking a bill of lading making the goods deliverable to himself or to his agent, or to the order of himself or of his agent, he thereby retains the right to the possession of the goods. The time when the property passes depends upon the intention of

⁵⁷ Benj. Sales, § 381.

⁵⁸ See *Godts v. Rose*, 17 C. B. 229.

⁵⁹ Ante, pp. 83-86.

⁶⁰ *Walt v. Baker*, 2 Exch. 1, per Parke, B.; *Gabarron v. Kreeft*, 10 Exch. 274, per Bramwell, B.; Benj. Sales, § 399.

the parties, and it may be that the seller in such case reserves the property as well as the right to possession, or that the property passes notwithstanding the form of the bill of lading. Where the seller has appropriated the goods to the contract, but takes a bill of lading to himself or to his own order under circumstances which indicate that he intends to reserve the property, it is commonly said that he thereby reserves "the right of disposal." It has been justly said that "the term 'right of disposal' is not the most apt word to employ when laying down a general rule with regard to the passing of the property,"⁶¹ and, although it has been retained in the English Sale of Goods Act,⁶² it has been discarded by the proposed American Sales Act.⁶³ The rules established by the decisions involving the so-called right of disposal will be stated in the following sections.

⁶¹ Benj. Sales (5th Eng. Ed.) p. 318, note 6.

"Where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfill these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession of the goods until these conditions are fulfilled, but involves a power to dispose of the goods on the vendee's default, so long, at least, as the vendee continues in default." *Ogg v. Shuter*, 1 C. P. Div. 47, per Lord Cairns.

In *Mirabita v. Bank*, 3 Exch. Div. 164, Bramwell, L. J., says: "I think it not necessary to inquire whether what the shipper possesses is a property, strictly so called, or a *jus disponendi*, because I think, whichever it is, the result must be the same." But in the same case Cotton, L. J., appears to speak of the reservation of the right of disposal and of the reservation of the right of property as synonymous.

⁶² Section 19.

⁶³ Section 20. In the note to this section Prof. Williston says: "Subsection (1) follows with some change of expression section 19 of the English Act, except that for the somewhat loose phrase 'right of disposal' is substituted 'possession or property.' The phrase '*jus disponendi*' has gained some currency as the expression of the right of a seller who has definitely appropriated goods to a contract, but who nevertheless takes a bill of lading to his own order. The truth is he has reserved the property as security. The situation is similar to that in a conditional sale."

Bill of Lading to Seller or to His Order.

When goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or of his agent, *prima facie* the seller reserves the property in the goods.⁶⁴ The fact that the seller takes the bill of lading to his own order is almost decisive to show his intention to reserve the property.⁶⁵ The presumption may, indeed, be rebutted by proof that in so doing he acted as agent of the buyer and did not intend to reserve the property; and it is for the jury to determine, as a question of fact, what the real intention was.⁶⁶ But the mere fact that the seller sends to the buyer an invoice describing the

⁶⁴ *Mirabita v. Bank*, 8 Exch. Div. 164, 172, per Cotton, L. J.; *Walt v. Baker*, 2 Exch. 1; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Moakes v. Nicholson*, 19 C. B. (N. S.) 290, 34 Law J. C. P. 273; *Ogg v. Shuter*, 1 C. P. Div. 47, reversing L. R. 10 C. P. 159; *Ellershaw v. Mag-niac*, 6 Exch. 570; *Falke v. Fletcher*, 34 Law J. C. P. 148 (mate's receipt); *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 296; *Farm-ers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 578; *Erwin v. Har-ris*, 87 Ga. 333, 13 S. E. 513; *Alabama, G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 South. 356; *Forchelmer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30; *Bergman v. Railroad Co.*, 104 Mo. 77, 15 S. W. 992. See, also, *Stollenwerck v. Thacher*, 115 Mass. 224; *Vaughn v. Railroad Co.*, 27 R. I. 235, 61 Atl. 695. See Sales Act, § 20 (2). Cf. Sale of Goods Act, § 19 (2), which provides that "the seller is *prima facie* deemed to reserve the right of disposal." The second sentence of Sales Act, § 20 (2), is new.

The delivery to the carrier may be such as to vest the property in the buyer, so that the issue of a bill of lading making the goods otherwise deliverable will not divest it. *Ogle v. Atkinson*, 5 Taunt. 759. See, also, *Philadelphia & R. R. v. Wireman*, 88 Pa. 264.

The property and the right to possession vest in the buyer upon indorsement and delivery of the bill of lading. *Wilmshurst v. Bowker*, 2 Man. & G. 792; *Key v. Cotesworth*, 7 Exch. 595; *Chas. F. Orthwein's Sons v. Elevator Co.*, 82 Tex. Civ. App. 600, 75 S. W. 864; *Mitchell v. Baker*, 208 Pa. 377, 57 Atl. 760.

Where the seller took a receipt making the goods deliverable to himself, and gave the buyer an order making the goods deliverable to him, and the carrier attorned to the buyer, the property passed. *Hatch v. Bayley*, 12 Cush. (Mass.) 27.

⁶⁵ *Shepherd v. Harrison*, L. R. 5 H. L. 116; *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Newcomb v. Railroad Corp.*, 115 Mass. 230; *Village of Bellefontaine v. Vassaux*, 55 Ohio St. 323, 45 N. E. 321.

⁶⁶ *Joyce v. Swann*, 17 C. B. (N. S.) 84; *Van Casteel v. Booker*, 2 Exch. 691; *Browne v. Hare*, 4 Hurl. & N. 822, 29 Law J. Exch. 6; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Hobart v. Littlefield*,

goods as shipped on his account and at his risk, while evidence of an intention to transfer the property,⁶⁷ is not enough to rebut the presumption;⁶⁸ and the presumption arises, although the seller ships the goods in the buyer's own vessel, and the bill of lading states that the goods are freight free and the buyer's own property.⁶⁹ The presumption that the seller reserves the property arises, also, when he takes the bill of lading to himself or to his agent.⁷⁰ When the seller thus reserves the property in the goods, for the purpose of entirely withdrawing them from the contract, he may dispose of them absolutely, even though he thereby commits a breach of the contract; nor will the property in the goods pass to the buyer upon tender by him of the price or of performance of the conditions of the contract.⁷¹ If the property does pass, but the seller retains possession of the bill of lading, he thereby reserves a right to the possession of the goods as against the buyer; in other words, he preserves his lien.⁷²

The effect of a shipment under the circumstances under consideration was stated in a leading case as follows:⁷³ "In the case of such a contract [a contract for sale of goods not specific], the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the

13 R. I. 341; *Hamilton v. Brewing Co.*, 129 Iowa, 172, 105 N. W. 439, 2 L. R. A. (N. S.) 1078.

⁶⁷ *Walley v. Montgomery*, 3 East, 585. Where the shippers, who were indebted to the consignee, took a bill of lading in their own name, but wrote to him, "We deliver you this load on our indebtedness," the property passed, and the consignee could maintain replevin against a creditor of the shippers who attached the goods while in possession of the carrier. *Straus v. Wessel*, 30 Ohio St. 211.

⁶⁸ Cases cited in note 65, *supra*.

⁶⁹ *Turner v. Trustees of Liverpool Docks*, 6 Exch. 543; *Gabarron v. Kreeft*, L. R. 10 Exch. 274.

⁷⁰ Where the seller delivered goods to a carrier, consigned to himself in care of the buyer, the property did not pass. *Ward v. Taylor*, 56 Ill. 494.

⁷¹ *Walt v. Baker*, 2 Exch. 1; *Ellershaw v. Magniac*, 6 Exch. 570; *Gabarron v. Kreeft*, L. R. 10 Exch. 274.

⁷² See *Browne v. Hare*, 4 Hurl. & N. 822, 29 L. J. Exch. 6, per Pollock, C. B.

⁷³ *Mirabita v. Bank*, 3 Exch. Div. 164, per Cotton, L. J.

bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation, and the property does not, on shipment, pass to the purchasers."

It must not be supposed, however, that, because the shipper is agent of the consignee, the property, if originally in the shipper, necessarily passes on shipment; for, if he advances his own money or credit for the purchase of the goods, he is in the position of a seller, and he may reserve the property in the goods to the extent of his advances, in the same manner.⁷⁴ "Where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property, and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid."⁷⁵

⁷⁴ *Jenkyns v. Brown*, 14 Q. B. 406.

⁷⁵ *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818. In *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732, referring to the doctrine stated in *Moors v. Kidder*, *supra*, the court says: "Nothing therein gives color to the idea that the correspondent's ownership is of that character which would permit his exaction, even though agreed to by the principal, of a general lien upon the property for other and prior indebtedness of the principal as against one in the situation of *St. Amant*. The correspondent's position is one of ownership, so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase price from the principal, or, in other words, upon receipt of the amount he advanced upon its credit. In no other sense is the correspondent the owner of the property."

Bill of Lading to Buyer or to His Order.

If by the bill of lading the goods are deliverable to the order of the buyer or of his agent, it seems that *prima facie* the property passes, but that by retaining the possession of the bill of lading the seller would reserve a right to the possession of the goods as against the buyer.⁷⁶ Where the goods are deliverable to the buyer, and not to his order, a somewhat different question is presented. It appears to be the custom of railway companies, when the bill of lading is not in terms negotiable, to deliver to the consignee named without presentation of the bill of lading, and it has been held that, in view of such a custom, although it cannot affect the question of the title of a transferee of the bill of lading as against the transferor thereof, the carrier is justified in delivering to the consignee without production of the bill of lading, as against such transferee, at least before notice of the transfer.⁷⁷ The fact that the seller takes a bill of lading in this form, however, is not conclusive in determining whether the property passes to the buyer on shipment. In such a case, *prima facie* the property pass-

⁷⁶ See *Browne v. Hare*, 4 Hurl. & N. 822, 29 L. J. Exch. 6, per Pollock, C. B., and Erle, J. Cf. Sales Act, § 20 (3). Prof. Williston says that this subsection, which is not in the English act, is thought to be warranted by existing law.

Where C. & Co., acting as commission agents for T. & Co. to provide funds for the purchase of goods drew bills on T. & Co. which they discounted, and with the proceeds purchased goods which they shipped, sending the bill of lading making the goods deliverable to the order of T. & Co. and the invoices by post direct to them, advising them of the bills drawn on them, which in ordinary course they accepted on presentment and paid at maturity, and some of which they accepted, but some of which they refused to accept, and none of which they paid, it was held that the property passed as soon as the goods were put on board and the bills of lading were put in the post directed to T. & Co. *Ex parte Banner*, 2 Ch. Div. 278.

Where the goods were shipped on the buyer's chartered vessel, and the seller took a set of three bills of lading making the goods deliverable to the buyer's order, but only one of the bills was stamped, and the seller retained it and sent one of the others to the buyer, this was evidence of an intention to reserve the property. *Moakes v. Nicholson*, 34 Law J. C. P. 273, 19 C. B. (N. S.) 290.

⁷⁷ *Forbes v. Railroad Co.*, 133 Mass. 154. Cf. *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. 114.

es;⁷⁸ but this inference may be overcome by evidence of a different intention, as by showing that the seller dealt with the bill of lading for the purpose of securing the price,⁷⁹ although this has been held not conclusive.⁸⁰

Dealing with Bill of Lading to Secure Price.

Although, when the seller on shipment takes a bill of lading to his own order, not as agent for the buyer, but on his own behalf, he thereby reserves the property in the goods, and the buyer acquires no rights in them, notwithstanding their appropriation to the contract, a different situation arises if the seller deals with the bill of lading only to secure the price, and not with the intention of withdrawing the goods entirely from the contract—as where he sends the bill of lading, together with a bill of exchange drawn on the buyer for the price, to an agent, with instructions to deliver the bill of lading on acceptance or payment of the bill of exchange. In such case, indeed, the property does not pass to the buyer until acceptance or payment of the bill of exchange or tender of the price;⁸¹

⁷⁸ *Emery v. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454.

Where the seller delivered goods to a carrier, consigned to the buyer, and took a shipping receipt in the name of the buyer, which he sent with a draft to a bank, with directions to deliver the receipt on acceptance of the draft, a finding that the property passed to the buyer on delivery to the carrier was warranted. *Wigton v. Bowley*, 130 Mass. 252.

⁷⁹ *Emery v. Bank*, supra; *Merchants' Exchange Bank v. McGraw*, 8 C. C. A. 420, 59 Fed. 972; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Hilmer v. Hills*, 138 Cal. 134, 70 Pac. 1060; *Greenwood Grocery Co. v. Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627.

⁸⁰ *Bank of Litchfield v. Elliott*, supra.

⁸¹ *Mirabita v. Bank*, 3 Exch. Div. 164, per Cotton, L. J.; *Shepherd v. Harrison*, L. R. 4 Q. B. 196; *Id.* 493, in the house of lords, L. R. 5 H. L. 116; *Ogg v. Shuter*, 1 C. P. Div. 47; *Alderman v. Railroad*, 115 Mass. 233; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 578; *Seeligson v. Philbrick* (C. C.) 30 Fed. 600; *Jones v. Brewer*, 79 Ala. 545; *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Baker v. Railroad Co.*, 98 Iowa, 438, 67 N. W. 376; *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698; *The Prussia* (D. C.) 100 Fed. 484; *Portland Flouring Mills Co. v. Insurance Co.*, 130 Fed. 860, 65 C. C. A. 344; *McArthur Co. v. Bank*, 122 Mich. 223, 81 N. W. 92; *Hopkins v. Cowen*, 90 Md. 152,

but upon such acceptance, or payment, or tender, the property vests in him.²² The seller thus retains the legal title to the goods only as security, the equitable title vesting in the buyer, the seller's right over the goods being in the nature of a mortgage.

Again, if the seller draws on the buyer for the price, and transmits the bill of exchange and the bill of lading directly to the buyer, upon condition that he shall not retain the bill of lading unless he honors the bill of exchange, the buyer is bound to return the bill of lading if he does not comply with the conditions; and if he wrongfully retains the bill of lading he acquires thereby no added right to it or to the goods.²³

44 Atl. 1062, 47 L. R. A. 124; *Vaughn v. Railroad Co.*, 27 R. I. 235, 61 Atl. 695. A bill of lading deliverable to order of the seller, when attached to and forwarded with a time draft, without special instructions, to an agent, for collection, may be surrendered to the drawee on acceptance of the draft. *National Bank of Commerce v. Bank*, 91 U. S. 92, 23 L. Ed. 208.

But it has been held such a bill of lading attached to and forwarded with a sight draft for collection, without other instructions, may not be surrendered without payment of the draft, notwithstanding that the draft is entitled to grace. *Michaud v. Lumber Co.*, 122 Mich. 305, 81 N. W. 93; And see *Security Bank v. Luttgen*, 29 Minn. 363, 13 N. W. 151; *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; *Kentucky Refining Co. v. Refining Co.*, 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468.

Where the buyer paid the draft and received the bill of lading without notice of an attachment of the goods as the seller's property, the attachment was good. *Kentucky Refining Co. v. Refining Co.*, 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468. Cf. *Peters v. Elliott*, 78 Ill. 321.

²² *Mirabita v. Bank*, *supra*. In this case *Cotton, L. J.*, said: "But, if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does, on payment or tender of the price, pass to the purchaser."

²³ *Shepherd v. Harrison*, L. R. 4 Q. B. 196; *Id.* 493, L. R. 5 H. L. 116, 133, per Lord Cairns; *Cahn v. Pockett* (1898) 2 Q. B. 61; *Id.* (1899) 1 Q. B. 643; *Cayuga County Nat. Bank v. Daniels*, 47 N.

Whether a buyer who does not comply with the condition, where the bill of lading makes the goods deliverable to him, either by its terms or by indorsement, can confer a good title upon a bona fide purchaser, independently of statute, is a question upon which the courts are not in accord.⁵⁴

Most frequently, when the seller wishes to secure the price, he draws on the buyer for the amount and obtains a discount of the bill of exchange from a banker, to whom he delivers it with the indorsed bill of lading attached. Under these circumstances the banker acquires a special property in the goods to secure his advances, and the property does not pass to the buyer until acceptance or payment of the bill or tender of the price.⁵⁵ The same rule is applied when the seller takes

Y. 631; Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818. Where the seller deposited in the mail, directed to the buyer, an unindorsed bill of lading, attached to a draft for the price, the question whether the property had passed was for the jury. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 South. 356.

A banker who made advances and took the bill of lading to his own order, with authority to dispose of the goods as security, and who indorsed the bill of lading to the buyer as his agent only to enable him to get the goods from the carrier, did not release his title. *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104. See Sales Act, § 20 (4), which provides that if he wrongfully retains the bill of lading "he acquires no added right thereby." Cf. Sale of Goods Act, § 19 (3), where the language is, "The property does not pass to him." It seems that wrongful retaining of the bill of lading would confer no right to possession, although the property might have passed.

⁵⁴ Ante, p. 36. Sales Act, § 20 (4), in accordance with mercantile understanding and convenience, protects the bona fide purchaser, although the bill of exchange has not been honored.

⁵⁵ *Mirabita v. Bank*, 3 Exch. Div. 164; *Jenkyns v. Brown*, 14 Q. B. 496, 19 Law J. Q. B. 286; *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Forty Sacks of Wool (C. C.)* 14 Fed. 643; *First Nat. Bank of Calro v. Crocker*, 111 Mass. 163; *Fifth Nat. Bank of Chicago v. Bayley*, 115 Mass. 223; *Forbes v. Railroad Co.*, 133 Mass. 154; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Hieskell v. Bank*, 89 Pa. 155, 33 Am. Rep. 745; *Halsey v. Warden*, 25 Kan. 128; *Security Bank v. Luttgen*, 29 Minn. 363, 13 N. W. 151; *Grayson County Nat. Bank v. Railway (Tex. Civ. App.)* 79 S. W. 1004.

a bill of lading making the goods deliverable to the buyer and thus deals with it to secure the price.⁸⁶ Under these circumstances the banker acquires a special property in the goods to secure his advances.⁸⁷ In some cases it has been held that a banker who purchases a draft, with the bill of lading attached making the goods deliverable to the order of the consignor, assumes the obligation of the seller to deliver according to the contract the goods represented by the bill of lading to the drawee of the draft;⁸⁸ but it is believed that this doctrine is erroneous. On principle the assignee of the bill of lading and of the draft takes the title of the seller only as security, and acquires substantially the right of a mortgagee, his interest being discharged by payment of the debt, and he becomes subject

⁸⁶ See cases cited note 79, *supra*.

⁸⁷ Whether one to whom a bill of lading is indorsed as security is a pledgee or a mortgagee depends upon the intention of the parties. *Sewell v. Burdick*, 10 App. Cas. 74. It seems that a banker who makes advances and takes the bill of lading to his own order, with authority to take possession and dispose of the goods for his security or reimbursement, is a mortgagee. See *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Mershon v. Wheeler*, 78 Wis. 502, 45 N. W. 95.

In *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104, it was said that the banker "had a title, whether absolute or qualified does not matter." But in *Moors v. Drury*, 186 Mass. 424, 71 N. E. 810, the view was taken that the banker was owner, and not a mortgagee or pledgee. And see *In re New Haven Wire Co.*, 57 Conn. 352, 18 Atl. 268, 5 L. R. A. 300.

Where a shipper drew against his consignment for sale upon the consignees, with whom his account was already overdrawn, and assigned the duplicate bill of lading to a bank which discounted the draft, the consignees had no right to apply the goods or their proceeds in discharge of the shipper's liability to themselves arising from other transactions; the bank having acquired title to the consignment to the extent of the draft discounted on security thereof. *First Nat. Bank v. Ege*, 109 N. Y. 120, 16 N. E. 817, 4 Am. St. Rep. 481; See, also, *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732.

⁸⁸ *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679 (cf. *Sloan v. Railroad Co.*, 126 N. C. 487, 36 S. E. 21; *Perry v. Bank*, 131 N. C. 117, 42 S. E. 551); *Searles Bros. v. Grain Co.*, 80 Miss. 688, 32 So. 287; *Haas v. Bank*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242.

to no liability to the buyer which he does not expressly assume; and this view is sustained by the weight of authority.**

** *Tolerton & Stetson Co. v. Bank*, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; *S. Blaisdell, Jr., Co. v. Bank*, 96 Tex. 628, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944 (overruling *Landa v. Latin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48); *Blaisdell & Co. v. White & Co.* (Tex. Civ. App.) 76 S. W. 70; *Hall v. Keller*, 64 Kan. 211, 87 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209. And see 49 L. R. A. 679, note; 1 L. R. A. (N. S.) 242, note; 14 Harv. Law Rev. 159.

CHAPTER V.

FRAUD AND RETENTION OF POSSESSION.

- 54-55. Contract or Sale Induced by Fraud.
- 56-57. Remedies of Defrauded Party.
- 58-59. Fraud on Creditors—Retention of Possession.
- 60. How Far Delivery is Essential to Transfer of Property against Creditors and Purchasers.

CONTRACT OR SALE INDUCED BY FRAUD.

- 54. When a party to a contract to sell or a sale has been induced to enter into it by the fraud of the other party, the contract or sale is voidable at his option.
- 55. CHARACTERISTICS OF FRAUD. Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it.

Fraud renders all contracts voidable both at law and in equity. A man is not bound by a contract to which his consent has been obtained by fraud, because but for the fraud he would not have consented.¹

Fraud is commonly said to be so subtle in its nature and manifold in its forms as to be impossible of definition. Nevertheless the statement of its essential characteristics which has been given above, substantially in the language of Sir William R. Anson² sufficiently indicates the nature of such fraud as will render voidable a contract of sale. The same state of facts which is ground for avoidance also gives rise to an action at common law for deceit, in which the defrauded party may recover such damages as he has suffered by reason of the false representation. And a practical test of fraud, as opposed to misrepresentation which is not fraudulent, is that the first

¹ Benj. Sales, § 428 et seq.; post, p. 188.

² Anson, Cont. 145. His discussion of fraud has been closely followed. And see Clark, Cont. (2d Ed.) 220.

does, and the second does not, give rise to an action *ex delicto*.³

Fraud is a False Representation.

A mistaken belief in the facts may be created by active means, as by fraudulent concealment or misrepresentation, or passively, by mere nondisclosure. But it is only when a man is under some obligation to disclose facts that mere silence will be considered as a means of deception. In contracts of sale, disclosure is not ordinarily incumbent on the seller.⁴ The rule is *caveat emptor*. It has even been held that the seller is under no obligation to communicate the existence of latent defects, such as a hidden disease in an animal, unless by act or implication he represents such defects not to exist;⁵ but it is generally held in this country that the intentional nondisclosure of such a defect by the seller, when he knows or has reason to know that it is unknown to the buyer, is fraudulent.⁶ On the other hand, the buyer is not bound to disclose to the seller facts as to which information is equally open to both; for example, facts which would enhance the price.⁷ Nor does

³ Clark, Cont. (2d Ed.) 209.

⁴ Smith v. Hughes, L. R. 6 Q. B. 597; Laidlaw v. Organ, 2 Wheat (U. S.) 178, 4 L. Ed. 214; People's Bank v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Kintzing v. McElrath, 5 Pa. 467; Cogel v. Kniseley, 89 Ill. 598.

⁵ Ward v. Hobbs, 3 Q. B. Div. 150, 4 App. Cas. 13; Beninger v. Corwin, 24 N. J. Law, 257; Paul v. Hadley, 23 Barb. (N. Y.) 521; Morris v. Thompson, 85 Ill. 16.

⁶ Paddock v. Strobbridge, 29 Vt. 471; Maynard v. Maynard, 49 Vt. 297; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Hanson v. Edgerly, 29 N. H. 343; Barron v. Alexander, 27 Mo. 530; Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421; Cardwell v. McClelland, 8 Sneed (Tenn.) 150; Armstrong v. Huffstutler, 19 Ala. 51; Marsh v. Webber, 13 Minn. 109 (Gil. 99); Turner v. Huggins, 14 Ark. 21; Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552; Stewart v. Rancho Co., 128 U. S. 383, 388, 9 Sup. Ct. 101, 32 L. Ed. 439; Downing v. Dearborn, 77 Me. 457, 1 Atl. 407; Joplin Water Co. v. Bathe, 41 Mo. App. 285.

⁷ Fox v. Mackreth, 2 Brown, C. C. 400; Turner v. Harvey, Jac. 170, per Lord Eldon; Laidlaw v. Organ, 2 Wheat. (U. S.) 178, 4 L. Ed. 214; Blydenburgh v. Welsh, Baldw. (U. S.) 331, Fed. Cas. No. 1,583; Kintzing v. McElrath, 5 Pa. 467.

A duty to disclose arises where the buyer stands in a confidential relation to the seller. Smith v. Sweeney, 69 Ala. 524; Oliver v. Oli-

his failure to disclose that he is insolvent amount to fraud, if he does not buy intending not to pay.⁸ As a rule, to charge the seller with fraud, there must be some active attempt to deceive either by statement which is false, or, at least, by representation which, though true as far as it goes, is accompanied by such a suppression of the facts as to convey a misleading impression.⁹ If the buyer wishes to protect himself further, he must require of the seller a warranty of any matter the risk of which he is unwilling to assume.¹⁰ Any device, however, used by the seller to induce the buyer to omit inquiry or examination into defects, is as much a fraud as active concealment.¹¹

The Representation must be of Fact.

Fact is here used in distinction from opinion, intention, and law.

Same—Not Matter of Opinion.

A mere representation of opinion which turns out to be unfounded will not invalidate a contract.¹² Thus statements of

ver, 118 Ga. 362, 45 S. E. 232. Cf. *Fletcher v. Bartlett*, 157 Mass. 113, 31 N. E. 760.

⁸ Post, p. 179.

⁹ *Peek v. Gurney*, L. R. 6 H. L. 377, 403, per Lord Cairns; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66.

A partial statement by the buyer as to his financial condition, if misleading, is fraudulent. *Newell v. Randall*, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; *Collins v. Cooley* (N. J. Eq.) 14 Atl. 574; *Tennessee Coal, I. & R. Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215. Cf. *Standard Horseshoe Co. v. O'Brien*, 88 Md. 335, 41 Atl. 898; *Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43.

¹⁰ *Veasey v. Doton*, 3 Allen (Mass.) 380, 381; *Morrison v. Koch*, 32 Wis. 254, 261.

¹¹ *Matthews v. Bliss*, 22 Pick. (Mass.) 48, 52; *Smith v. Countryman*, 30 N. Y. 665, 681; *Roseman v. Canovan*, 43 Cal. 110; *Croyle v. Moses*, 90 Pa. 250, 35 Am. Rep. 654; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623. See, also, *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678.

¹² *Belcher v. Costello*, 122 Mass. 189; *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Lyons v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372; *Watts v. Cummins*, 59 Pa. 84; *Buschman v. Codd*, 52 Md. 207; *O'Donnell & Duer Brewing Co. v. Farrar*, 163 Ill. 471, 45 N. E. 283; *Barrie v. Jerome*, 112 Ill. App. 329; *Vodrey Pottery Co. v. H. E. Horne Co.*, 117 Wis. 1, 93 N. W. 823; *Greene v. Société Anonyme* (C. O.) 81 Fed. 64; *Han-*

value are generally regarded as expressions of opinion,¹³ though representations of facts affecting the value,¹⁴ for example that a third person gave so much for a thing,¹⁵ are material. And the circumstances may be such as to justify the other party in relying on a statement of value, as where the one party has special knowledge or means of knowledge not open to the other,¹⁶ or the relations between them are confidential.¹⁷ By a somewhat fine distinction, however, statements of what the seller gave or was offered for the thing sold are by some courts deemed to be mere statements of value, on which the buyer is not entitled to rely.¹⁸ In like manner, com-

sen v. Cold Storage Co., 86 Fed. 832. Clark, Cont. (2d Ed.) 224, and cases cited.

¹³ Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Uhler v. Semple, 20 N. J. Eq. 288; Schramm v. O'Connor, 98 Ill. 539; Kennedy v. Richardson, 70 Ind. 524; Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344.

Market value: Burns v. Mahannah, 39 Kan. 87, 17 Pac. 319; Cronk v. Cole, 10 Ind. 485.

¹⁴ Chrysler v. Canaday, 90 N. H. 272, 278, 48 Am. Rep. 166; Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Coolidge v. Goddard, 77 Me. 578, 1 Atl. 831; Smith, Kline & French Co. v. Smith, 166 Pa. 563, 31 Atl. 343; Wilson, Close & Co. v. Pritchett, 99 Md. 583, 58 Atl. 360.

¹⁵ Belcher v. Costello, 122 Mass. 189; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Coolidge v. Goddard, 77 Me. 578, 1 Atl. 831; Caswell v. Hunton, 87 Me. 277, 32 Atl. 899.

¹⁶ Picard v. McCormick, 11 Mich. 68; Bish v. Beatty, 111 Ind. 408, 12 N. E. 523; Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Andrews v. Jackson, 168 Mass. 268, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; Welch v. Olmstead, 90 Mich. 492, 51 N. W. 541; Maxted v. Fowler, 94 Mich. 106, 53 N. W. 921; Peck v. Jenison, 99 Mich. 326, 58 N. W. 612; Stoppleman v. Paetz, 75 Wis. 510, 44 N. W. 834; Crane v. Elder, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795; Hirschberg Optical Co. v. Richards, 62 Mo. App. 408; Strand v. Griffith, 97 Fed. 854, 38 C. C. A. 444.

¹⁷ Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416; Baum v. Holton, 4 Colo. App. 406, 36 Pac. 154.

¹⁸ Medbury v. Watson, 6 Metc. (Mass.) 249, 250, 39 Am. Dec. 726; Hemmer v. Cooper, 8 Allen (Mass.) 334; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Dillman v. Nadlehofer, 119 Ill. 567, 7 N. E. 88; Way v. Ryther, 165 Mass. 220, 42 N. E. 1128; Gassett v. Glazier, 165 Mass. 473, 43 N. E. 193; Boles v. Merrill, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; Cole v. Smith, 26 Colo. 506, 58 Pac. 1036;

mentary expressions, such as men habitually use to induce others to enter into a bargain, known as "dealer's talk," are not deemed representations of fact. "Simplex commendatio non obligat."¹⁹ The line between fact and opinion is a narrow one, and, when a statement may be taken in either sense, it is for the jury to determine which it is.²⁰ A false representation by the seller concerning the quality, character, or soundness of the goods, if made with knowledge of its falsity or without belief in its truth,²¹ may be ground for avoiding the sale, provided the circumstances were such that the buyer was entitled to rely on the representation.²²

Mackenzie v. Seeberger, 76 Fed. 108, 22 O. C. A. 83. *Contra*: *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; *Harlow v. LaBrum*, 82 Hun (N. Y.) 292, 31 N. Y. Supp. 487; *Miller v. Buchanan*, 10 Ind. App. 474, 38 N. E. 56; *Moline Plow Co. v. Carson*, 72 Fed. 387, 18 C. C. A. 606; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

One attempting to sell an express business falsely stated the price he paid for it, and that another was attempting to buy it at a certain price, and that the business was earning a certain sum, and he had a stated number of regular customers, who paid sums named. Held that, though the two first-named representations were merely "dealer's talk," the latter were material, and the buyer had a right to rely on them. *Boles v. Merrill*, *supra*.

In *Way v. Ryther*, *supra*, it was held that, where the seller stated that the goods were billed to him at a certain price, evidence that he stated that he could not find the bill and kept it from the buyer to prevent him from discovering the cost was admissible to show fraud. And see *Welch v. Burdick*, 101 Iowa, 70, 70 N. W. 94; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

¹⁹ *Morse v. Shaw*, 124 Mass. 59; *Teague v. Irwin*, 127 Mass. 217; *Sledge v. Scott*, 56 Ala. 202; *Jackson v. Collins*, 39 Mich. 557, 561; *Patten v. Glatz* (C. C.) 87 Fed. 283; *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394.

²⁰ *Homer v. Perkins*, 124 Mass. 431, 433, 26 Am. Rep. 877; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113; *Dawson v. Graham*, 48 Iowa, 378.

²¹ *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Scott v. Perrin*, 4 Bibb. (Ky.) 360; *Nelson v. Martin*, 105 Pa. 229; *Ripley v. Chase*, 78 Mich. 126, 43 N. W. 1097, 18 Am. St. Rep. 428; *McCorkell v. Karhoff*, 80

²² *Bruner v. Strong*, 61 Tex. 555; *H. Hirschberg Optical Co. v. Michaelson*, 1 Neb. (Unof.) 137, 95 N. W. 461; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105.

Same—Not Matter of Intention—Intention Not to Pay.

Again, an expression of intention does not amount to a statement of fact, nor does a promise; and a representation that a thing is must be distinguished from a promise that it shall be.²³ Yet there is a distinction between a promise which the promisor intends to perform and one which he intends to break. In the first place, he represents his intention that something shall take place in the future; in the second case, he not only makes a promise which is ultimately broken, but he represents his existing intention—that is, he represents his state of mind to be other than it really is.²⁴ And accordingly it is held that if a man buys goods on credit not intending to pay for them, he makes a fraudulent misrepresentation, and that the seller may rescind the sale.²⁵

Iowa, 545, 58 N. W. 913; Blythe v. Speake, 23 Tex. 429; Whitworth v. Thomas, 83 Ala. 308, 8 South. 781, 8 Am. St. Rep. 725; Spaulding v. Hanscom, 67 N. H. 401, 32 Atl. 154; Hennessey v. Damourrette, 15 Colo. App. 354, 62 Pac. 229.

²³ Long v. Woodman, 58 Me. 49.

²⁴ Anson, Cont. 148; Clark, Cont. (2d Ed.) 225.

²⁵ Load v. Green, 15 Mees. & W. 216; Ferguson v. Carrington, 9 Barn. & C. 59; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Byrd v. Hall, *41 N. Y. 646; Johnson v. Monell, Id. 655; Stewart v. Emerson, 52 N. H. 301; Dow v. Sanborn, 8 Allen (Mass.) 181; Parker v. Byrnes, 1 Low. (U. S.) 539, Fed. Cas. No. 10,728; Stoutenborough v. Konkle, 15 N. J. Eq. 33; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Allen v. Hartfield, 76 Ill. 358; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Fox v. Webster, 46 Mo. 181; Belding v. Frankland, 8 Lea (Tenn.) 67, 41 Am. Rep. 630; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; Henry v. Vliet, 36 Neb. 138, 54 N. W. 122, 19 L. R. A. 590; Frisbee v. Chickering, 115 Mich. 185, 73 N. W. 112; Cox Shoe Mfg. Co. v. Adams, 105 Iowa, 402, 75 N. W. 316; Waterbury v. Miller, 13 Ind. App. 197, 41 N. E. 383; Reager v. Kendall (Ky.) 39 S. W. 257; Bugg v. Wertheimer-Schwartz Co., 64 Ark. 12, 40 S. W. 134; Selsel v. Wells, 99 Ga. 159, 25 S. E. 266. In Pennsylvania it is held that a mere intention not to pay, though accompanied by insolvency, is not sufficient, but that there must be artifice, trick, or false representation. Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51; Rodman v. Thalheimer, 75 Pa. 232; Bughman v. Bank, 159 Pa. 94, 28 Atl. 209. In Alabama it is declared that it must appear (1) that the buyer was at the time insolvent or in failing circumstances; (2) that he had a preconceived design not to pay for the goods, or no reasonable expectation

The intention not to pay must exist at the time of the sale²⁵ or contract to sell,²⁷ and must be an intention not to pay at all.²⁸ Therefore the mere fact that the buyer knows that he is insolvent and fails to disclose the fact does not constitute fraud, if he does not buy intending not to pay.²⁹ Some cases, indeed, hold that it is not enough to constitute fraud that the buyer has no reasonable expectation of being able to pay;³⁰ but it is generally held that the absence of reasonable expectation of being able to pay is equivalent to an intention not to pay.³¹

of being able to pay for them; and (3) that he intentionally concealed these facts, or made a fraudulent representation in regard to them. *Maxwell v. Shoe Co.*, 114 Ala. 304, 21 South. 1009; *Wilk v. Key*, 117 Ala. 285, 23 South. 6.

²⁵ *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *John V. Farwell Co. v. Linn*, 59 Ill. App. 245; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. 637; *Leedom v. Mayer*, 114 Wis. 267, 90 N. W. 169. And see *Skinner v. Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Brooks v. Paper Co.*, 94 Tenn. 701, 81 S. W. 160. Cf. *Whitten v. Filtzwater*, 129 N. Y. 623, 29 N. E. 298.

²⁷ *Foerster v. Gallinger*, 62 Hun (N. Y.) 439, 17 N. Y. Supp. 144.

²⁸ *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Armstrong v. Lewis*, 33 Ill. App. 164; *Beebe v. Hatfield*, 67 Mo. App. 609; *Strickland v. Willis* (Tex. Civ. App.) 43 S. W. 602.

²⁹ *Cross v. Peters*, 1 Greenl. (Me.) 376, 10 Am. Dec. 78; *Morrill v. Blackman*, 42 Conn. 324; *Bell v. Ellis*, 33 Cal. 620; *Mears v. Waples*, 3 Houst. (Del.) 581; *Carnahan v. Bailey* (C. C.) 23 Fed. 519; *Kelsey v. Harrison*, 29 Kan. 143; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Edelhoff v. Manufacturing Co.*, 86 Md. 595, 39 Atl. 314; *Sprague, Warner & Co. v. Kempe*, 74 Minn. 465, 77 N. W. 412; *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; *Halla-cher v. Henlein* (Tenn. Ch. App.) 39 S. W. 869; *Fulton v. Giblan*, 98 Ga. 224, 25 S. E. 431; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Sinnott v. Bank*, 164 N. Y. 386, 58 N. E. 286; *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107.

³⁰ *Biggs v. Barry*, 2 Curt. (U. S.) 259, Fed. Cas. No. 1,402; *Manheimer v. Harrington*, 20 Mo. App. 297; *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Dorman v. Weakley* (Tenn. Ch. App.) 39 S. W. 890; *Syracuse Knitting Co. v. Blanchard*, 69 N. E. 447, 43 Atl. 637.

³¹ *Davis v. Stewart* (C. C.) 8 Fed. 803; *Jaffrey v. Brown* (C. C.) 29 Fed. 476; *Whitten v. Filtzwater*, 129 N. Y. 623, 29 N. E. 298; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720; *Slagle & Co. v. Goodnow*,

Same—Representation of Buyer as to Financial Condition.

In a sale on credit, a representation by the buyer as to his solvency or financial condition is material, and if it is knowingly false, or is made without belief in its truth, and induces the sale, it constitutes fraud.³³ The representation must, of course, be of fact, and not of opinion,³³ and must not relate to something to be done.³⁴

Same—Not Matter of Law.

Finally, a misrepresentation of law does not ordinarily give rise to an action of deceit or make a contract voidable.³⁵ Private right of ownership, however, although it may be the result, also, of a matter of law, is a matter of fact; and if the

45 Minn. 531, 48 N. W. 402; *Edelhoff v. Manufacturing Co.*, 86 Md. 595, 39 Atl. 314; *Reid v. Lloyd*, 52 Mo. App. 278; *McKenzie v. Rothschild*, 119 Ala. 419, 24 South. 716.

³² *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40; *Cincinnati Cooperage Co. v. Gaul*, 170 Pa. 545, 32 Atl. 1093; *McKinney v. Bank*, 86 Neb. 629, 54 N. W. 963; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Clark v. William Munroe Co.*, 127 Mich. 300, 86 N. W. 816; *Bell v. Kaufman*, 9 Colo. App. 259, 47 Pac. 1035; *McKenzie v. Weinman*, 116 Ala. 194, 22 South. 508; *Bugg v. Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Werthelmer Schwartz Shoe Co. v. Faris* (Tenn. Ch. App.) 46 S. W. 336; *Fitchard v. Doheny*, 98 App. Div. 9, 86 N. Y. Supp. 964. A representation made after sale is, of course, immaterial. *Coffin v. Hollister*, 54 Hun (N. Y.) 639, 7 N. Y. Supp. 734, affirmed 124 N. Y. 644, 26 N. E. 812; *Robinson v. Levi*, 81 Ala. 134, 1 South. 554; *Manhattan Brass Co. v. Reger*, 168 Pa. 644, 32 Atl. 64. But, if made before the sale is consummated, the seller may rescind. *Bliss v. Sickles*, 66 Hun, 633, 21 N. Y. Supp. 273, affirmed 142 N. Y. 647, 36 N. E. 1064; post, p. 182.

³³ *Franklin Sugar Refining Co. v. Collier*, 89 Iowa, 69, 56 N. W. 279; *White v. Fitch*, 19 R. I. 687, 36 Atl. 425; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 56, 69 N. W. 820; *William B. Grimes Dry-Goods Co. v. Jordan*, 7 Kan. App. 192, 53 Pac. 186; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. 637.

³⁴ *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. 747; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 50, 69 N. W. 820; *Skinner v. Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413.

³⁵ *Upton v. Tribilcock*, 91 U. S. 45, 49, 23 L. Ed. 203; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Townsend v. Cowles*, 31 Ala. 423; *Fish v. Cleland*, 33 Ill. 238; *Clem v. Railroad Co.*, 9 Ind. 488, 68 Am. Dec. 653; *People v. Board of Sup'rs*, 27 Cal. 655; *Clark*, Cont. (2d Ed.) 226.

seller fraudulently represents the goods to be his own, when they are not, the buyer may avoid the contract on that ground.³⁶

The Representation must be Made with Knowledge of Its Falsity, or in Reckless Disregard of the Truth.

A false statement, made by one who believes the truth of what he asserts, though it may warrant avoidance for mistake,³⁷ or may amount to a warranty,³⁸ is not fraudulent.³⁹ A false statement, made without knowledge of its falsity, is not as a rule fraudulent.⁴⁰ But the mere absence of belief is enough; for, if a man states as true that of which he is ignorant, he must be held as responsible as if he had asserted what he knew to be untrue. Therefore, if a man makes a representation recklessly, without knowledge whether it be true or false, and it is actually false, his liability is the same as if he knew it was false;⁴¹ and, if he represents a fact as true of his

³⁶ Case v. Hall, 24 Wend. (N. Y.) 102, 35 Am. Dec. 605; Sweetman v. Prince, 62 Barb. (N. Y.) 256; Simpson v. Wiggin, 3 Woodb. & M. (U. S.) 413, Fed. Cas. No. 12,887; Hale v. Philbrick, 42 Iowa, 81; Hallsell v. Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 353; ante, p. 52. As to warranty of title, see post, p. 242. Fraudulent representation as to lien or incumbrance. Merritt v. Robinson, 35 Ark. 483; Stevenson v. Marble (C. C.) 84 Fed. 23. Failure to disclose want of title may constitute fraud. Abbott v. Marshall, 48 Me. 44.

³⁷ Ante, p. 52 et seq.

³⁸ Post, p. 236 et seq.

³⁹ Benj. Sales, § 429.

⁴⁰ Collins v. Evans, 5 Q. B. 820; Ormrod v. Huth, 14 Mees. & W. 651; Lord v. Goddard, 13 How. (U. S.) 198, 14 L. Ed. 111; King v. Eagle Mills, 10 Allen (Mass.) 548; Pettigrew v. Chellis, 41 N. H. 95; Allen Wanamaker, 31 N. J. Law, 370; Bigler v. Flickinger, 55 Pa. 279; Lamm v. Association, 49 Md. 233, 33 Am. Rep. 246; Mason v. Chappell, 15 Grat. (Va.) 572; Kimbell v. Moreland, 55 Ga. 164; Parmlee v. Adolph, 28 Ohio St. 10; Tone v. Wilson, 81 Ill. 529; Gregory v. Schoenell, 55 Ind. 101; Rawson v. Harger, 48 Iowa, 269; Mamlock v. Fairbanks, 46 Wis. 415, 1 N. W. 167, 32 Am. Rep. 716; Merriam v. Lumber Co., 23 Minn. 314; Rightor v. Roller, 31 Ark. 171; Clark, Cont. (2d Ed.) 229. But see Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497; Totten v. Burhans, 91 Mich. 499, 51 N. W. 1119.

⁴¹ Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; Weir v. Bell, 3 Exch. Div. 238, 242; Nettleton v. Beach, 107 Mass. 499; Fisher v. Mellen, 103 Mass. 503; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Hammond v. Pennock, 61 N. Y. 145; Meyer v. Amidon, 45 N. Y. 169; Bower v. Fenn, 90 Pa. 359, 35 Am. Rep. 662; Cowley

own knowledge when he has no knowledge, it is immaterial that he believed it to be true.⁴² And it is generally held in this country that an unqualified statement of a material fact susceptible of knowledge implies a representation of knowledge, and that if the representation be false it is fraudulent.⁴³ In England and in some states it is held that a statement made in the honest belief that it is true is not fraudulent, notwithstanding absence of reasonable grounds for believing it true.⁴⁴

Motive.

If the representation was fraudulent as the term has above been explained, it is immaterial that the motive was innocent.⁴⁵

Must be Intention That Representation should be Acted on—Representation to Commercial Agency.

The representation must be made with the intention that it should be acted on.⁴⁶ Another statement of this rule is that the

v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; *Smith v. Newton*, 59 Ga. 113; *Foard v. McComb*, 12 Bush (Ky.) 723; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Parmlee v. Adolph*, 28 Ohio St. 10; *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473; *Walsh v. Morse*, 80 Mo. 569.

⁴² *Litchfield v. Hutchinson*, 117 Mass. 195; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Marsh v. Falker*, 40 N. Y. 562; *Dulaney v. Rogers*, 64 Mo. 201.

⁴³ *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (cf. *Goodwin v. Trust Co.*, 152 Mass. 189, 25 N. E. 100); *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 506, 6 L. R. A. 149, 18 Am. St. Rep. 485; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516 (cf. *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325); *Olcott v. Bolton*, 50 Neb. 779, 70 N. W. 366; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609; *Simon v. Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; *Clark*, Cont. (2d Ed.) 230; 9 Cyc. 423.

⁴⁴ *Derry v. Peek*, 14 App. Cas. 337; *Merwin v. Arbuckle*, 81 Ill. 501; *Lamberton v. Dunham*, 165 Pa. 129, 30 Atl. 716; *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437; *Anson*, Cont. (8th Ed.) 172.

⁴⁵ *Polhill v. Walter*, 3 Barn. & Adol. 114; *Peek v. Gurney*, L. R. 6 H. L. 409; *Hammond v. Pennock*, 61 N. Y. 145; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Clark*, Cont. (2d Ed.) 232.

⁴⁶ *Buschman v. Codd*, 52 Md. 202; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Thorp*

representation must be made as part of the same transaction.⁴⁷ If a representation is made by one of the parties to the contract, the intention that it should be acted on will generally be manifest. The representation need not, however, be made directly to the injured party.⁴⁸ Thus a statement made by the buyer to a commercial agency for the purpose of being communicated to its patrons and thereby obtaining credit, if communicated to the seller, is a representation on which he may rely,⁴⁹ al-

v. Smith, 18 Wash. 277, 51 Pac. 381; *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386.

⁴⁷ *Pollock*, Cont. (3rd Ed.) 545; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

⁴⁸ *Barry v. Croskey*, 2 Johns. & H. 1, 17, per Wood, V. C., at page 22; *Langridge v. Levy*, 2 Mees. & W. 519; *Peek v. Gurney*, L. R. 6 H. L. 377; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Bank of Montreal v. Thayer* (C. C.) 7 Fed. 623.

⁴⁹ *Fechheimer v. Baum* (C. C.) 37 Fed. 167, 2 L. R. A. 153; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Emerson v. Spring Co.*, 100 Mich. 127, 59 N. W. 659; *Gainseville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; *John V. Farwell Co. v. Boyce*, 17 Mont. 83, 42 Pac. 98; *Charles P. Kellog Co. v. Holm*, 82 Minn. 416, 85 N. W. 159; *Soper Lumber Co. v. Halsted & Har-mount Co.*, 73 Conn. 547, 48 Atl. 425; *George D. Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97; *Ernst v. Cohn* (Tenn. Ch. App.) 62 S. W. 186; *Courtney v. Manufacturing Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Tennent Shoe Co. v. Stovel & Brand*, 78 S. W. 417, 25 Ky. Law Rep. 1615; *Tindle v. Birkett*, 57 App. Div. 450, 67 N. Y. Supp. 1017, affirmed 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Arnold v. Richardson*, 74 App. Div. 581, 77 N. Y. Supp. 763; *In re Epstein* (D. C.) 109 Fed. 874.

One who makes a statement to an agency is not bound to furnish it with a statement of a change in his condition not amounting to insolvency. *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Reld, Murdock & Co. v. Kempe*, 74 Minn. 474, 77 N. W. 413. And see *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Strickland v. Willis* (Tex. Civ. App.) 43 S. W. 602. Otherwise if he has become insolvent, or his condition has become such that he will be obliged to suspend. *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425. And see *Boaz v. Manufacturing Co.* (Tex. Civ. App.) 40 S. W. 866.

Failure to report the truth, when he knows a false rating is being carried on the books of the agency, is fraudulent. *Taylor v. Mills Co.*, 47 Ark. 247, 1 S. W. 283; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

though the buyer is, of course, not responsible for representations made by the agency based on information not furnished by himself.⁵⁰ In order to entitle the seller to rely on a representation as to the buyer's financial condition, the representation must be made to himself or to a third person for the purpose of being communicated.⁵¹ Whether a statement may be regarded as a representation of financial standing at a later date depends on the circumstances of the particular case.⁵²

The Representation must be Material and must Induce the Sale.

A material representation is one which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business on hand.⁵³ If such an untrue statement has been made and was in fact an inducement to the other party to enter into the contract, it is unimportant that it was not the sole inducement; but it is enough if it was a material element in influencing him to enter into it.⁵⁴ If the representation was such that it might induce

⁵⁰ *Macullar v. McKinley*, 99 N. Y. 353, 2 N. E. 9; *Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. 129; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hiller v. Ellis*, 72 Miss. 701, 18 South. 95, 41 L. R. A. 707; *Cream City Hat Co. v. Tollinger*, 62 Neb. 98, 86 N. W. 921; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. 162; *In re Roalswick* (D. C.) 110 Fed. 639.

⁵¹ *Van Kleek v. Leroy*, 4 Abb. Dec. (N. Y.) 479; *Bach v. Tuck*, 57 Hun (N. Y.) 588, 10 N. Y. Supp. 884, affirmed 126 N. Y. 53, 26 N. E. 1019; *Bliss v. Sickles*, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 273, affirmed 142 N. Y. 647, 36 N. E. 1064; *Staver & Abbott Mfg. Co. v. Coe*, 49 Ill. App. 426; *McKenzie v. Weinman*, 116 Ala. 194, 22 South. 508. Cf. *Silberman v. Munroe*, 104 Mich. 352, 62 N. W. 555; *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116, 86 N. W. 913.

⁵² *Morris v. Talcott*, 96 N. Y. 107; *Howell v. Berger*, 19 Misc. Rep. 315, 44 N. Y. Supp. 259; *Goldsmith v. Stern* (Sup.) 84 N. Y. Supp. 869.

Statement to commercial agency. *Humphrey v. Smith*, 7 App. Div. 442, 39 N. Y. Supp. 1055; *Schram v. Strouse* (Tex. Civ. App.) 28 S. W. 262; *Nicholls v. McShane*, 16 Colo. App. 165, 64 Pac. 375; *Wal-drop v. Wolff*, 114 Ga. 610, 40 S. E. 830; *George D. Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97.

⁵³ *Pol. Cont.* 528; See *Greenleaf v. Gerald*, 94 Me. 91, 46 Atl. 799, 50 L. R. A. 542, 80 Am. St. Rep. 377.

⁵⁴ *Safford v. Grout*, 120 Mass. 20; *McAleer v. Horsey*, 35 Md. 439; *Ruff v. Jarrett*, 94 Ill. 475; *Moline-Milburn Co. v. Franklin*, 37 Minn. 137, 33 N. W. 323; *Hahlo v. Grant*, 56 Hun, 649, 10 N. Y. Supp.

the other party to enter into the contract on the faith of it, it is a fair inference that he actually acted in reliance upon it.⁵⁵ And, if he actually relies upon the representation, the fact that he had means of knowledge which, if used, would have led to a discovery of the untruth will not bar him of his remedy.⁵⁶ The mere fact that he obtained other information, if it did not disclose the falsity of the representation, is immaterial.⁵⁷

But, however false or dishonest the representations may be which are used to induce a party to enter into a contract, they do not constitute a fraud if he is not deceived; for under such circumstances the inducement or motive is not the representations, which are not believed, but some independent motive.⁵⁸ The representations must be relied upon.⁵⁹ For the same rea-

188, affirmed 132 N. Y. 593, 30 N. E. 1151; *Higbee v. Trumbauer*, 112 Iowa, 74, 83 N. W. 812; *French & American Importing Co. v. Drug Co.*, 75 Ark. 95, 86 S. W. 836.

⁵⁵ *Smith v. Chadwick*, 9 App. Cas. 187; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Garrison v. Electrical Works*, 59 N. J. Eq. 440, 45 Atl. 612.

⁵⁶ *Redgrave v. Hurd*, 20 Ch. Div. 1; *Jackson v. Collins*, 39 Mich. 557; *Kendall v. Willson*, 41 Vt. 567; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Union Nat. Bank v. Hunt*, 76 Mo. 439.

⁵⁷ *Olcott v. Bolton*, 50 Neb. 779, 70 N. W. 866; *Cabaness v. Holland*, 19 Tex. Civ. App. 383, 47 S. W. 379; *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799.

If the buyer relies on an examination or test made by himself or another, he does not rely on the representation. *Howell v. Biddlecom*, 62 Barb. (N. Y.) 131; *Hagee v. Grossman*, 31 Ind. 223; *Haley v. Manning*, 2 Tex. Civ. App. 17, 21 S. W. 711; *Brewer v. Arantz*, 124 Ala. 127, 26 South. 922.

⁵⁸ *Gunby v. Sluter*, 44 Md. 237; *Philpps v. Buckman*, 30 Pa. 401; *Gregory v. Schoenell*, 55 Ind. 101; *Sledge v. Scott*, 56 Ala. 202; *Smith v. Newton*, 59 Ga. 113. If the buyer accepts the goods with knowledge of the fraud, he cannot repudiate the contract. *Baird v. City of New York*, 96 N. Y. 567; *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52; *Norfolk & New Brunswick Hosiery Co. v. Arnold*, 49 N. J. Eq. 390, 23 Atl. 514; *W. W. Kimball Co. v. Raw*, 7 Kan. App. 17, 51 Pac. 789.

⁵⁹ *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; *Hanna v. Rayburn*, 84 Ill. 533; *Holdom v. Ayer*, 110 Ill. 448; *Lilienthal v. Brewing Co.*, 154 Mass. 185, 28 N. E. 151, 12 L. R. A. 821, 26 Am. St. Rep. 234.

The fact that a considerable time has elapsed after the representa-

son, if the attempted fraud does not come to the knowledge of the other party, it will not avail him in avoidance of the contract. Thus where the seller inserted a metal plug to conceal a weak spot in a gun manufactured to the order of the buyer, who took it without inspection, it was held that the attempted fraud did not exonerate him from paying for the gun; since, although the seller intended to deceive him, he had in fact not been deceived.⁶⁰ If the action is for deceit, damages from the fraud must be proved.⁶¹

Representations Where Means of Knowledge are at Hand.

Many cases lay down the rule broadly that, if the means of knowledge are at hand and equally available to both parties, the buyer will not be heard to say that he has been deceived.⁶² But it seems, on principle, that a person cannot escape the effect of his fraudulent representation on the ground of the credulity of the injured party or of his negligence in failure to ascertain the facts.⁶³ And it is accordingly very generally held that, if the buyer actually relies on the seller's representation, the fact that he had means of knowledge which, if used, would have led to a discovery of the untruth, will not bar him of his remedy.⁶⁴

tion before the contract was entered into does not necessarily show that it was not relied on. *Seaver v. Dingley*, 4 Me. 306; *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938; *Chisholm v. Eisenbuth*, 69 App. Div. 134, 74 N. Y. Supp. 496.

⁶⁰ *Horsfall v. Thomas*, 1 Hurl. & C. 90. See remarks on this case in *Anson*, Cont. 152.

⁶¹ *Pasley v. Freeman*, 3 Term R. 51; 2 Smith, Lead. Cas. (8th Ed.) 66; *Brown v. Blunt*, 72 Me. 415; *Weaver v. Wallace*, 9 N. J. Law, 251.

⁶² *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627; *Anschutz v. Miller* (C. C.) 20 Fed. 376; *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Gatling v. Newell*, 12 Ind. 118; *Journal Printing Co. v. Maxwell*, 1 Pennewill (Del.) 511, 43 Atl. 615; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613. See *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1064, 70 Am. St. Rep. 262, per Holmes, J.; *Clark*, Cont. (2d Ed.) 223.

⁶³ *Clark*, Cont. (2d Ed.) 228.

⁶⁴ *Hale v. Philbrick*, 42 Iowa, 81; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Burroughs v. Guano Co.*, 81 Ala. 255, 1 South. 212; *Fargo Gas & Coke Co. v. Electric Co.*, 4 N. D. 219, 59 N. W. 1068, 37 L. R. A. 593; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

REMEDIES OF DEFRAUDED PARTY.

56. ELECTION TO AFFIRM OR RESCIND. The defrauded party may:

- (1) Affirm the contract or sale, and recover damages for the fraud in an action of deceit, or, if sued on the contract, set up the fraud in reduction of the demand.
- (2) Rescind the contract or sale and recover what he has parted with, or set up the rescission in defense of an action on the contract.

57. BONA FIDE PURCHASERS. A bona fide purchaser for value from the fraudulent buyer acquires an indefeasible title.

Election to Affirm or Rescind.

A contract induced by fraud is not void, but only voidable, at the option of the party defrauded; in other words, it is valid until rescinded. It is for the party defrauded to elect whether he will be bound.⁶⁵ But, if he affirms the contract, he must affirm it in all its terms. Thus a seller who has been induced by fraud to sell on credit cannot sue for the contract price before the expiration of the credit, but must rescind, and sue in trover or replevin.⁶⁶ When the contract is once affirmed, the election is completely determined.⁶⁷ After affirmance, the

⁶⁵ *Rawlins v. Wickham*, 3 De Gex & J. 304, 322; *Clough v. London & N. W. Ry. Co.*, L. R. 7 Exch. 26; *Union Stock-Yards & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837. And see cases cited note 66; *infra*; *Clark, Cont.* (2d Ed.) 234.

⁶⁶ *Ferguson v. Carrington*, 9 Barn. & C. 59; *Emma Silver Min. Co. v. Mining Co. (C. C.)* 7 Fed. 401; *Adler v. Fenton*, 24 How. (U. S.) 407, 16 L. Ed. 696; *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Dellone v. Hull*, 47 Md. 112; *Stewart v. Emerson*, 52 N. H. 301, 310; *Bulkley v. Morgan*, 46 Conn. 393; *Kellogg v. Turple*, 93 Ill. 265, 34 Am. Rep. 163; *Stoutenborough v. Konkle*, 15 N. J. Eq. 33; *Weed v. Page*, 7 Wis. 503. Otherwise in New York, where it is held that the seller may rescind as to the credit and sue at once for the price. *Wigand v. Sichel*, 42 N. Y. 120; *Roth v. Palmer*, 27 Barb. (N. Y.) 652; *Heilbronn v. Herzog*, 33 App. Div. 311, 53 N. Y. Supp. 841, 843; *Jaffrey v. Wolf*, 4 Okl. 303, 47 Pac. 496 (New York contract). See, also, *Dietz v. Sutcliffe*, 80 Ky. 650.

⁶⁷ *Clough v. Railway Co.*, L. R. 7 Exch. 26, 34; *Moller v. Tuska*,

sole remedy of the defrauded party for the fraud is by way of damages, which he may recover in an action of deceit; or, if he be the buyer, he may set up the fraud by way of recoupment in an action by the seller for the price.⁶⁸ It is not necessary that the affirmance should be express. Any acts which unequivocally treat the contract as subsisting, such as dealing with the goods as his own on the part of the buyer or taking security for the price on the part of the seller, will have the same effect.⁶⁹ Bringing suit on the contract is a conclusive affirmance.⁷⁰ Bringing an action for deceit, if the buyer retains the goods, and asks damages for the difference between the goods as represented and as they actually were, is an affirmance.⁷¹ Where the election to affirm has once been ex-

87 N. Y. 166; *Pence v. Langdon*, 99 U. S. 578, 582, 25 L. Ed. 420; *First Nat. Bank v. Tootle*, 59 Neb. 44, 80 N. W. 264.

⁶⁸ *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Perley v. Balch*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; *Foulk v. Eckert*, 61 Ill. 818; *Lukens v. Alken*, 174 Pa. 152, 84 Atl. 575.

A vendee who has been induced by the fraud of his vendor to make a contract of purchase, which contains warranties made by the vendor, has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, recover the damages he has sustained for the fraud, and also those resulting from a breach of the warranties of the vendor; but he cannot do both. *Wilson v. Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 241.

⁶⁹ *Clough v. Railway Co.*, L. R. 7 Exch. 26, 34; *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. Ed. 798; *Joslin v. Cowee*, 52 N. Y. 90; *Seavy v. Potter*, 121 Mass. 297; *Cross v. Hayes*, 45 N. J. Law, 565; *Davis v. Betz*, 60 Ala. 206; *Evans v. Montgomery*, 50 Iowa, 325, 337; *Bridgeford v. Adams*, 45 Ark. 136; *Droege v. Manufacturing Co.*, 163 N. Y. 466, 57 N. E. 747; *Samples v. Guyer*, 120 Ala., 611, 24 South. 942. Acquiescence is evidence of election. *Fleming v. Hanley*, 21 R. I. 141, 42 Atl. 520. A mere effort to obtain security is not an election. *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330.

⁷⁰ Cases cited in note 66, *supra*; *First Nat. Bank v. Tootle*, 59 Neb. 44, 80 N. W. 264. But obtaining judgment in ignorance of the fraud does not amount to an affirmance. *Clough v. London & N. W. Ry. Co.*, L. R. 7 Exch. 26, 35; *Kraus v. Thompson*, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182.

⁷¹ *Emma Silver Min. Co. v. Mining Co. (C. C.)* 7 Fed. 401, 402. It has indeed been laid down broadly that bringing action for deceit affirms the sale. *Kimball v. Cunningham*, 4 Mass. 505, 3 Am.

exercised, the subsequent discovery of a new incident in the fraud will not revive the right to rescind.⁷³

If, on the other hand, the defrauded party elects to rescind, he must manifest his election by distinctly communicating to the other party his intention to repudiate the contract.⁷⁴ It is not necessary to a rescission that the contract should be judicially set aside.⁷⁵ Thus, if the defrauded party be the buyer, he may refuse to accept the goods if he discover the fraud before delivery, or may return them if the discovery be not made till after delivery; and, if he has paid the price, he may recover it back on offering to return the goods.⁷⁶ On the other hand, the defrauded party may set up the rescission as a defense in an action by the other on the contract;⁷⁷ or he may, if the remedy at law is inadequate, institute proceedings in equity to have the contract set aside.⁷⁸ Election to rescind waives the right to sue on the contract.⁷⁹

Dec. 230. Cf. *Whiteside v. Brawley*, 152 Mass. 133, 134, 24 N. E. 1038. But the action for deceit does not necessarily imply an affirmation, as where the seller reclaims such goods as he can reach, and as to the remainder sues the buyer to recover damages for the fraud. *Hersey v. Benedict*, 15 Hun (N. Y.) 282. See, also, *Hubbell v. Meigs*, 50 N. Y. 480, 487; *Miller v. Barber*, 66 N. Y. 558, 564; *Lenox v. Fuller*, 89 Mich. 268; *Clark*, Cont. (2d Ed.) 235; 9 Cyc. 433.

⁷³ *Campbell v. Fleming*, 1 Adol. & E. 40; *Pratt v. Philbrook*, 41 Me. 132. But see *Pierce v. Wilson*, 34 Ala. 596.

⁷⁴ *Ashley's Case*, L. R. 9 Eq. 263; *Hammond v. Pennock*, 61 N. Y. 145, 155; *Potter v. Taggart*, 54 Wis. 395, 400, 11 N. W. 678; *Gates v. Bliss*, 43 Vt. 299.

⁷⁵ *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64, 73.

⁷⁶ *Clarke v. Dickson*, El. Bl. & El. 148; *Coolidge v. Brigham*, 1 Metc. (Mass.) 547.

⁷⁷ *Clough v. Railway Co.*, L. R. 7 Exch. 26, 36.

⁷⁸ *Anson*, Cont. 154; *Clark*, Cont. (2d Ed.) 235.

⁷⁹ *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328; *Wright v. Zeigler*, 70 Ga. 501. Cf. *Powers v. Benedict*, 88 N. Y. 605. The seller who has rescinded, but has not recovered all the goods, may sue for the conversion of the remainder, or, if they have been converted into money, may waive the tort and sue in assumpsit. *Farwell v. Myers*, 64 Mich. 234, 31 N. W. 128; *Powers v. Benedict*, 88 N. Y. 605; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.

Restitutio in Integrum.

The right of a party to rescind for fraud, as for other causes, is conditional upon his restoring the other party to the position in which he was before the contract. Thus the seller must return or offer to return the price, and the buyer must return or offer to return the goods,⁷⁹ though he need not do so if they are absolutely worthless.⁸⁰ Accordingly, if the buyer has consumed or sold any part of the goods, he cannot rescind; though, if he is the guilty party, he cannot prevent a rescission if the seller elects to take a partial restoration.⁸¹ But the fact

⁷⁹ *Clarke v. Dickson*, El. Bl. & El. 148; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Thayer v. Turner*, 8 Metc. (Mass.) 550; *Cook v. Gilman*, 34 N. H. 560; *Hammond v. Buckmaster*, 22 Vt. 375; *Tisdale v. Buckmore*, 33 Me. 461; *Burton v. Stewart*, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654; *Haase v. Mitchell*, 58 Ind. 213; *Herman v. Haffenegger*, 54 Cal. 161; *Friend Bros. Clothing Co. v. Hurlburt*, 98 Wis. 183, 73 N. W. 784; *Samples v. Guyer*, 120 Ala. 611, 24 South. 942.

Where the buyer's note has been received in payment, it is sufficient if he surrender it at the trial. *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700. See, also, *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Skinner v. Hoop Co.*, 119 Mich. 467, 78 N. W. 547. Cf. *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875. Contra: *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

The seller cannot excuse failure to return the note of a third person given for the price by showing that it was worthless by reason of the maker's insolvency. *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858. *Clark*, Cont. (2d Ed.) 237.

⁸⁰ *Kent v. Bornstein*, 12 Allen (Mass.) 342; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203; *Smith's Adm'r v. Smith*, 30 Vt. 139; *Dill v. O'Ferrall*, 45 Ind. 268.

If the things received are capable of serving any purpose of advantage by their possession or control, or if their loss would be a disadvantage in any way, they must be returned. "This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (*Connor v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103), and the sack that covered the rejected bale of cotton. *Morse v. Brackett*, 98 Mass. 205; *Id.*, 104 Mass. 494." *Bassett v. Brown*, 105 Mass. 553.

⁸¹ *Hammond v. Pennock*, 61 N. Y. 145; *Harper v. Terry*, 70 Ind. 264.

that the thing has depreciated in value by natural causes or reasonable use, or that it has been necessarily destroyed in discovering the fraud, will not defeat rescission on his part.³² And if in the meantime he has incurred expenses for repairs he may on rescission and return recover the cost,³³ but if he is the guilty party he cannot exact a payment of such cost as a condition of rescission.³⁴ And if the defrauded party, by reason of the wrongful conduct of the wrongdoer, is rendered incapable of restoring the latter to his former position, to that extent such restoration is unnecessary to a rescission.³⁵ Indeed, the rule requiring the return of what has been received is frequently relaxed where its enforcement would not tend to accomplish a just result. "This rule," it has been said, "is wholly an equitable one. Impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required."³⁶ Thus it has been held that the seller may rescind without returning payments on account of the price, where it appears that the value of the goods claimed does not exceed the balance unpaid,³⁷ or where the fraudulent buyer has disposed of more than enough of the goods to cover

³² *Veazie v. Williams*, 8 How. (U. S.) 134, 156, 12 L. Ed. 1018; *Neblett v. Macfarland*, 92 U. S. 101, 104, 23 L. Ed. 471; *Gatling v. Newell*, 9 Ind. 572; *Faulkner v. Klamp*, 16 Neb. 174, 20 N. W. 220; *Campbell Printing Press & Mfg. Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799.

³³ *Canada v. Canada*, 6 Oush. (Mass.) 15; *Farris v. Ware*, 60 Me. 482.

³⁴ *Guckenheimer v. Angevine*, 81 N. Y. 394; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832.

³⁵ *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Hammond v. Pennock*, 61 N. Y. 145; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527; *Gates v. Raymond*, 106 Wis. 657, 82 N. W. 530.

³⁶ *Sloane v. Shiffer*, 156 Pa. 59, 27 Atl. 67, per Dean, J. See 9 Cyc. 441.

³⁷ *Schofield v. Shiffer*, 156 Pa. 65, 27 Atl. 69. See, also, *Tootle v. Bank*, 34 Neb. 863, 52 N. W. 306; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206; *Gay v. D. M. Osborne & Co.*, 102 Wis. 641, 78 N. W. 1079; *John V. Farwell Co. v. Hilton*, 84 Fed. 293, 39 L. R. A. 579.

the amount paid,⁸⁰ or where the goods have been damaged by the buyer to the amount of the payment received.⁸¹

Bona Fide Purchasers from Fraudulent Buyer.

It follows from the principle that the contract is voidable, and not void, that, when innocent third persons have for value acquired rights under the sale, their rights are indefeasible. The rule is also stated to be an application of the principle of convenience that, when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.⁸² Thus, when a sale is procured by fraud, the property in the goods is transferred by the contract,⁸³ subject to the seller's right of rescission, and a purchaser in good faith from the fraudulent

⁸⁰ *Sloane v. Shiffer*, *supra*.

Where the sale sought to be rescinded consists of several purchases, plaintiff is entitled to treat them as independent sales; and all payments made by defendants on account may be applied to the first purchase, unless otherwise designated by defendants; and plaintiff would be entitled to rescind the other sales, without returning or offering to return the payments received on the first. *Friend Bros. Clothing Co. v. Hulbert*, 98 Wis. 183, 73 N. W. 784.

⁸¹ *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527.

⁸² *Tol. Cont.* (3d Ed.) 556; *Babcock v. Lawson*, 4 Q. B. Div. 394.

Where J. on August 21st had contracted to sell to defendants a quantity of linseed, and they gave their notes, which he pledged as collateral for a loan, and J., who had been negotiating with plaintiffs for the linseed, on August 21st contracted for it, and on August 24th, induced by his fraudulent representations, plaintiffs delivered it to him, and he delivered it to defendants, plaintiffs were entitled to recover it; defendants not having parted with value upon the assertion of a right by J. for which plaintiffs were in any way responsible. *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Id.*, 58 N. Y. 73, 17 Am. Rep. 208.

But where the buyer by fraud obtained delivery of corn from the seller, and defendants purchased a bill of exchange drawn by the buyer, relying on his representations that it was drawn on a shipment of grain, it could not be said that defendants "trusted to an assertion of title for which the plaintiffs were in no way responsible." *Parker v. Baxter*, 86 N. Y. 586.

⁸³ In some of the early cases it was held that the property did not pass. See *Earl of Bristol v. Willmore*, 1 Barn. & C. 514; *Benj. Sales*, § 434.

buyer before the sale is rescinded acquires a good title.⁹² The purchase must be in good faith; that is, the purchaser must acquire title from the fraudulent buyer without notice of the defects in his title, or knowledge of circumstances to put him upon inquiry as to the source of the wrongdoer's title.⁹³ The purchase must be for value, and hence the protection does not extend to attaching creditors⁹⁴ or to an assignee in bankruptcy.⁹⁵ By the great preponderance of authority in this country a person is not held to be a purchaser for value if he takes the goods in payment of a pre-existing debt,⁹⁶ or by way of pledge

⁹² *White v. Garden*, 10 C. B. 919, 20 Law J. C. P. 167; *Stevenson v. Newnham*, 13 C. B. 285, 22 Law J. C. P. 110; *Pease v. Gloahec*, L. R. 1 P. C. 220, 3 Moore, P. C. (N. S.) 556; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Hoffman v. Noble*, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; *Easter v. Allen*, 8 Allen (Mass.) 7; *Kingsbury v. Smith*, 13 N. H. 109; *Titcomb v. Wood*, 38 Me. 561; *Williamson v. Russell*, 39 Conn. 406; *Paddon v. Taylor*, 44 N. Y. 371; *Stevens v. Brennan*, 79 N. Y. 254; *Sinclair v. Healy*, 40 Pa. 417, 80 Am. Dec. 589; *Hall v. Hinks*, 21 Md. 406; *Williams v. Given*, 6 Grat. (Va.) 268; *Kern v. Thurber*, 57 Ga. 172; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Hawkins v. Davis*, 8 Baxt. (Tenn.) 506; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Holland v. Swain*, 94 Ill. 154; *Bell v. Cafferty*, 21 Ind. 411; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788; *Wineland v. Coonce*, 5 Mo. 296, 32 Am. Dec. 320; *Cochran v. Stewart*, 21 Minn. 435; *Sargent v. Sturm*, 23 Cal. 359, 33 Am. Dec. 118; *Lightman v. Boyd*, 132 Ala. 618, 32 South. 714; *Sales Act*, § 24; ante, p. 43.

⁹³ *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208; *Scheuer v. Goetter*, 102 Ala. 313, 14 South. 774; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217.

⁹⁴ *Buffington v. Gerrish*, 15 Mass. 158, 8 Am. Dec. 97; *Devoe v. Brandt*, 53 N. Y. 462; *Thaxter v. Foster*, 153 Mass. 151, 26 N. E. 434; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Jordan v. Parker*, 56 Me. 557; *Oswego Starch Fact. v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53.

⁹⁵ *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Bussing v. Rice*, 2 Cush. (Mass.) 48; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101; *Benesch v. Well*, 69 Md. 276, 14 Atl. 666; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892. Contra: *Wickham v. Martin*, 13 Grat. (Va.) 427; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

⁹⁶ *Stevens v. Brennan*, 79 N. Y. 258; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; *Poor v. Woodburn*, 25 Vt. 235; *McGraw v. Solomon*, 83 Mich. 442, 47 N. W. 345; *Henderson v. Gibbs*, 39 Kan. 679, 18 Pac. 926; *Eaton v. Davidson*, 46 Ohio St. 355, 21 N. E. 442; *Hurd v. Blackford*, 85 Me. 217, 27 Atl. 107, 35 Am.

or mortgage as security for a pre-existing debt.⁹⁷ In this respect the rule is different from that applicable to negotiable instruments, as to which an antecedent debt constitutes value where an instrument is taken in satisfaction or as security therefor.⁹⁸ For the sake of having a single rule for what constitutes a valuable consideration, and in view of mercantile convenience, the proposed Sales Act has adopted the rule that "an antecedent debt or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken in satisfaction thereof or as security therefor."⁹⁹ If the fraudulent buyer has sold the goods to a bona fide purchaser, the seller may in equity follow the proceeds of the resale so long as they in turn have not come into the hands of a bona fide purchaser,¹⁰⁰ provided they can be traced and identified.¹⁰¹

St. Rep. 353; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Schloss v. Feltus*, 103 Mich. 525, 61 N. W. 797, 38 L. R. A. 161; *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902; *Belleville Pump & Skeln Works v. Samuelson*, 16 Utah, 234, 52 Pac. 282. Contra: *Shufeldt v. Pease*, 16 Wis. 659; *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401.

⁹⁷ *Goodwin v. Loan & Trust Co.*, 152 Mass. 189, 199, 25 N. E. 100; *Edson v. Hudson*, 83 Mich. 450, 47 N. W. 347; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527; *Reid, Murdoch & Co. v. Bird*, 15 Colo. App. 116, 61 Pac. 353; *Adam, Meldrum & Anderson Co. v. Stewart*, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; *Phelps, Dodge & Palmer Co. v. Samson*, 113 Iowa, 145, 84 N. W. 1051.

To vest a mortgagee with the rights of an innocent purchaser, a pre-existing debt is not sufficient; but, if any sum is paid at the time of the execution of the mortgage, the mortgagee may be protected to that extent. *Commercial Nat. Bank v. Pirie*, 82 Fed. 799, 27 O. C. A. 171.

⁹⁸ *Norton, Bills & Notes* (3d Ed.) 310.

⁹⁹ *Sales Act*, § 76 (1).

¹⁰⁰ *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757; *Sheffield v. Mitchell*, 31 App. Div. 266, 52 N. Y. Supp. 925.

In *American Sugar Refining Co. v. Fancher*, *supra*, where the goods were resold and the original seller rescinded, it was held that equity had jurisdiction to follow the proceeds into the hands of the fraudulent buyer's assignee for the benefit of creditors and subject them to a lien in favor of the defrauded seller.

¹⁰¹ *Farwell v. Kloman*, 45 Neb. 424, 63 N. W. 798.

Same—Fraudulent Impersonation.

A sale, however, is to be distinguished from a mere delivery of possession induced by fraud; for in the latter case the person obtaining possession acquires no property in the goods, and can pass none to a third person, however innocent.¹⁰² Thus where a person obtains goods by fraudulently impersonating a third person,¹⁰³ or by pretending to be the agent of a third person,¹⁰⁴ to whom the owner supposes he is selling the goods, the person thus obtaining the goods acquires no title, and a bona fide purchaser from him stands in no better position. In such a case there is no contract at all, as the seller never consented to sell to the person to whom he delivered the goods.

¹⁰² *Baehr v. Clark*, 83 Iowa, 313, 49 N. W. 840, 13 L. R. A. 717.

¹⁰³ *Cundy v. Lindsay*, 3 App. Cas. 459; *Loeffel v. Pohlman*, 47 Mo. App. 574.

In *Cundy v. Lindsay*, *supra*, one A. Blenkarn wrote to plaintiffs, proposing to buy goods of them. The letters were headed "37 Wood Street," and the signature, "Blenkarn & Co.," was written to resemble "Blenkiron & Co."; there being a reputable firm of "W. Blenkiron & Son" at 123 Wood street. Plaintiffs, who knew the reputation of W. Blenkiron & Son, but not their street number, sent the goods to "Blenkiron & Co.," 37 Wood Street, and Blenkarn sold the goods to defendants, who were bona fide purchasers. In the action for conversion, it was held that plaintiffs could recover; they having no knowledge of and not intending to deal with Blenkarn, but with Blenkiron & Co., and no contract of sale having existed with Blenkarn.

Compare *Edmunds v. Transportation Co.*, 135 Mass. 283, where A. in person represented to the seller that he was B., a man of credit, and the seller, relying on the representation, sold goods to him, and it was held that the property passed; there being a contract, though voidable between the parties, and the seller intending to contract with the person identified by sight and hearing.

¹⁰⁴ *Higsons v. Burton*, 28 Law J. Exch. 842; *Hardman v. Booth*, 1 Hurl. & C. 803, 32 Law J. Exch. 105; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; *Barker v. Dinsmore*, 72 Pa. 427, 13 Am. Rep. 697; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *McCrillis v. Allen*, 57 Vt. 505; *Peters Box & Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367. See, also, *Kinsey v. Leggett*, 71 N. Y. 387; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Smith Premier Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400.

If the buyer makes no false representation, he can give good title, although the seller supposed he was buying as agent for another. *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369; *ante*, p. 52.

Rescission must be Within a Reasonable Time.

What is a reasonable time after the discovery of the fraud depends on the circumstances of the case.¹⁰⁵ Mere lapse of time will furnish evidence, and, when the lapse of time is great, probably conclusive evidence, of affirmance.¹⁰⁶ If in the meantime the superior rights of third persons have intervened, or the position of the other party has altered to his disadvantage, the defrauded party would be deprived of his right to rescind.¹⁰⁷

FRAUD ON CREDITORS—RETENTION OF POSSESSION.

58. IN GENERAL. A sale made with the intent on the part of the seller and the buyer to delay, hinder, or defraud the creditors of the seller is deemed fraudulent, and may be avoided by such creditors, unless a third person has in good faith and for value acquired an interest in the goods sold. A sale fraudulent as to creditors is valid as between the parties, and a bona fide purchaser for value from the fraudulent buyer before avoidance acquires an indefeasible title.

59. RETENTION OF POSSESSION. Where a person, having sold goods, continues in the possession of them, in some jurisdictions it is held by the courts or is enacted that such retention of possession is conclusive evidence of fraud; while in other jurisdictions it is held or enacted that such retention of possession is prima facie evidence of fraud, but that the good faith of the transaction may be shown.

¹⁰⁵ *Smith v. Bank*, 45 Neb. 344, 63 N. W. 796; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308.

¹⁰⁶ *Clough v. Railway Co.*, 7 Exch. 26; *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099.

¹⁰⁷ *Clough v. Railway Co.*, L. R. 7 Exch. 26, 35; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. Ed. 798; *Williamson v. Railroad Co.*, 28 N. J. Eq. 277, 293; *Id.*, 29 N. J. Eq. 311, 319; *Willoughby v. Moulton*, 47 N. H. 206; *Burton v. Stewart*, 3 Wend. (N. Y.) 239, 20 Am. Dec. 692; *Herrin v. Libbey*, 36 Me. 357; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Wilson v. Fisher*, 5 Houst. (Del.) 395; *Bassett v. Brown*, 105 Mass. 551, 557; *Evans v. Montgomery*, 50 Iowa, 325; *Hall v. Fullerton*, 69 Ill. 448; *Parmlee v. Adolph*, 23 Ohio St. 10; *Collins v. Townsend*, 53 Cal. 608; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Snyder v.*

The foundation of the law on this subject is usually considered to be the statute of 13 Eliz. c. 5,¹⁰⁸ made perpetual by the statute of 29 Eliz. c. 5, although earlier statutes had been previously passed, and it has been said upon high authority that the principles of the common law are so strong against fraud that without these statutes every end proposed by them would have been obtained.¹⁰⁹ The statute of 13 Eliz. c. 5, provides in substance that all conveyances and sales of land or chattels made with intent to delay, hinder, or defraud creditors shall be utterly void and of no effect against them, with a proviso that the act shall not extend to defeat any estate or interest conveyed upon good consideration and bona fide to any person not having at the time of such conveyance notice of the fraud. The statute has been substantially re-enacted in many of the states of the Union, but its principles have been adopted even in states where no such statute has been passed.¹¹⁰

Hegan, 40 S. W. 693, 19 Ky. Law Rep. 517; Clark, Cont. (2d Ed.) 236.

¹⁰⁸ "For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, * * * devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts: * * * be it therefore declared, ordained and enacted that all and every feoffment, gift, grant, alienation, bargain, and conveyance of land, tenements, hereditaments, goods, and chattels, * * * and also every bond, suit, judgment, and execution * * * had or made to or for any intent or purpose before declared and expressed shall be from henceforth deemed and taken (only against that person or persons. * * * whose actions, suits, debts, * * * by such guileful, covinous, or fraudulent devices and practices, * * * are * * * in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void. * * *"
St. 13 Eliz. c. 5.

¹⁰⁹ Cadogan v. Kennett, 1 Cowp. 432, per Lord Mansfield; Hamilton v. Russel, 1 Oranch (U. S.) 300, 310, 2 L. Ed. 118, per Marshall, C. J.; Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 338, 6 Am. Dec. 281, per Kent, C. J.

¹¹⁰ Dyer v. Homer, 22 Pick. (Mass.) 258; Butler v. Moore, 73 Me. 151, 40 Am. Rep. 348. By force of the common law, transfers of goods and chattels with intent to defraud creditors are voidable, though "goods and chattels" are not named in the Minnesota statute. Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942.

Mutual Intent to Defraud.

A sale is not fraudulent against creditors unless the intent to delay, hinder, or defraud them is shared by the grantee as well as by the debtor.¹¹¹ Therefore the mere intent on the part of the debtor to defeat a creditor will not avoid a sale as fraudulent, if it be made bona fide and for a valuable consideration.¹¹² It is sufficient if the consideration be a past indebtedness. For it is not fraudulent at common law to prefer one creditor to another. If the debtor is unable to pay all his debts, he commits no fraud (in the absence of statutory provisions regulating the distribution of insolvent estates) by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others.¹¹³ Nor does it make any difference that both debtor and creditor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtor's property by legal process in satisfaction of their claims, or that such is actually the intention of the debtor; provided there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, and that the sole object of the latter is to obtain payment or security for his debt.¹¹⁴ But if the purpose of the debtor is to defraud his creditors, and that purpose is participated in by the preferred creditors, although the principal purpose of the conveyance is to secure a bona fide debt of the lat-

¹¹¹ *Rindskopf v. Myers*, 87 Wis. 80, 57 N. W. 967.

¹¹² *Wood v. Dixie*, 7 Q. B. 892; *Darvill v. Terry*, 6 Hurl. & N. 807, 30 Law J. Exch. 355; *Beurmann v. Van Buren*, 44 Mich. 496, 7 N. W. 67. Creditors cannot complain of a transfer of exempt property. *Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735; *Nash v. Stevens*, 96 Iowa, 616, 65 N. W. 825.

¹¹³ *Holbird v. Anderson*, 5 Term R. 235; *Marbury v. Brooks*, 7 Wheat. (U. S.) 556, 5 L. Ed. 522; *Brooks v. Marbury*, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; *Smith v. Skeary*, 47 Conn. 47; *Ferguson v. Spear*, 65 Me. 277; *York County Bank v. Carter*, 38 Pa. 446, 80 Am. Dec. 494; *Gage v. Chesebro*, 49 Wis. 486, 5 N. W. 881; *Butler v. White*, 25 Minn. 432.

¹¹⁴ *Banfield v. Whipple*, 14 Allen (Mass.) 13, 15; *Carr v. Briggs*, 156 Mass. 78, 81, 30 N. E. 470; *Dudley v. Danforth*, 61 N. Y. 626; *Hessing v. McCloskey*, 37 Ill. 341; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Hirsch v. Richardson*, 65 Miss. 227, 3 South. 569; *Jewell v. Knight*, 123 U. S. 426, 434, 8 Sup. Ct. 193, 31 L. Ed. 190; *Nichols v. Bancroft*, 74 Mich. 191, 41 N. W. 891.

ter, the conveyance is wholly void as to the creditors intended to be defrauded.¹¹⁵

In respect to the necessity of mutual fraudulent intent, conveyances for a valuable consideration differ from voluntary conveyances. The latter may be avoided where a fraudulent intent on the part of the debtor exists, although the grantee did not share it.¹¹⁶

Retention of Possession.

Whether a transfer of goods is bona fide or fraudulent is now generally held to be a question of fact for the jury. Few questions in the law, however, have given rise to greater conflict of authority than that of the effect of retention of possession by the grantor upon the bona fides of the transaction. Retention of possession and use by the grantor was resolved in *Twyne's Case*,¹¹⁷ the leading case upon the subject of fraudulent conveyances, to be a sign of fraud. In *Edwards v. Harben*,¹¹⁸ it was held that if there be nothing but the absolute conveyance without transfer of possession, the transaction is in point of law fraudulent; but later decisions in England establish the proposition that continued possession is a fact to be considered by the jury as evidence of fraud, but it is not fraud per se.¹¹⁹

Probably the prevailing view in the United States, where the question is unaffected by statute, is that retention of possession is prima facie evidence of fraud, but that the good faith of the transaction may be shown;¹²⁰ but in some jurisdictions

¹¹⁵ *Harris v. Sumner*, 2 Pick. (Mass.) 137; *Crowninshield v. Kirtledge*, 7 Metc. (Mass.) 520; *Bean v. Smith*, 2 Mason (U. S.) 252, Fed. Cas. No. 1,174.

¹¹⁶ *Blake v. Sawin*, 10 Allen (Mass.) 340; *Young v. Heermans*, 66 N. Y. 374; *Laughton v. Harden*, 68 Me. 208; *Willson v. Spear*, 68 Vt. 145, 34 Atl. 429.

¹¹⁷ 3 Coke, 80b; 1 Smith, Lead. Cas. 1.

¹¹⁸ 2 Term, R. 587.

¹¹⁹ *Martindale v. Booth*, 3 Barn. & Adol. 498; *Cookson v. Swrie*, 9 App. Cas. 653, 664, per Lord Blackburn, who points out that it was to put a stop to the evils growing out of this rule that the bills of sales acts were passed,—acts of similar character to the chattel mortgage acts in this country.

¹²⁰ *Crawford v. Neal*, 144 U. S. 535, 12 Sup. Ct. 759, 36 L. Ed. 552; *Brooks v. Powers*, 15 Mass. 247, 8 Am. Dec. 99; *Allen v.*

it is held that retention of possession is conclusive proof of fraud.¹²¹ In many states statutes have been passed, some declaring sales without transfer of possession fraudulent,¹²² and others declaring them merely prima facie fraudulent.¹²³ In jurisdictions where the rule prevails that retention of possession is only prima facie evidence of fraud, some courts hold that a constructive delivery, as by an agreement on the part of the seller to hold as bailee, is sufficient,¹²⁴ and other courts declare that, if the subject of sale is not reasonably capable of delivery, a "constructive delivery" is sufficient, giving a somewhat loose construction to that term.¹²⁵ Perhaps the true rule is, where there is no actual delivery, that the nature of the goods and the impossibility or difficulty of transferring possession, and the situation of the parties, with all other circumstances tending to show that the possession after the sale was in pur-

Wheeler, 4 Gray (Mass.) 123; Briggs v. Weston, 36 Fla. 629, 18 South. 852; Smith v. Jones, 63 Ark. 232, 37 S. W. 1052; Goodwin v. Goodwin, 90 Me. 23, 37 Atl. 352, 60 Am. St. Rep. 231; Teague v. Bass, 131 Ala. 422, 31 South. 4.

¹²¹ Hatstat v. Blakeslee, 41 Conn. 302; Parker v. Marvell, 60 N. H. 30; Weeks v. Prescott, 53 Vt. 57; Stephens v. Gifford, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868; Lehr v. Brodbeck, 192 Pa. 535, 43 Atl. 1006, 73 Am. St. Rep. 828; Hadden v. Dooley, 92 Fed. 274, 34 C. C. A. 338.

It is immaterial that the creditor has notice of the sale. Warwick Iron Co. v. Bank (Pa.) 13 Atl. 79. See, also, Perrin v. Reed, 35 Vt. 2; Lawrence v. Burnham, 4 Nev. 361, 97 Am. Dec. 540; Basinger v. Spangler, 9 Colo. 175, 10 Pac. 809.

¹²² See Stanley v. Coke Co., 24 Colo. 108, 49 Pac. 35; George v. Matonni, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; State v. Goetz, 131 Mo. 675, 33 S. W. 161; Howard v. Dwight, 8 S. D. 398, 66 N. W. 935.

¹²³ See Klipp v. Lamoreaux, 81 Mich. 299, 45 N. W. 1002; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Phillips v. Reitz, 16 Kan. 396; Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114; Menken v. Baker, 40 App. Div. 609, 57 N. Y. Supp. 541, affirmed 166 N. Y. 628, 60 N. E. 1116; Higgins v. Spahr, 145 Ind. 167, 43 N. E. 11; Conrad v. Smith, 6 N. D. 337, 70 N. W. 815. See, also, Williston, Cas. Sales, 384, note.

¹²⁴ Shaul v. Harrington, 54 Ark. 305, 15 S. W. 835; Hight v. Harris, 56 Ark. 98, 19 S. W. 235. Contra: Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

¹²⁵ Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

suance of some agreement not inconsistent with the honesty of the transaction, are admissible in evidence to show its good faith.¹²⁶ In jurisdictions where the retention of possession by the seller is conclusive proof of fraud, retention of possession in accordance with the terms of the transfer is generally immaterial, and an actual delivery is required, unless the subject of the sale is not reasonably capable of an actual delivery, in which case it is only necessary that the buyer should assume control of the subject, so as reasonably to indicate to all concerned the fact of the change of ownership.¹²⁷ A full consideration of the conflicting decisions concerning the effect of retention of possession and of the various statutory provisions cannot be attempted in an elementary book.¹²⁸

In some jurisdictions the rule prevails that delivery, actual or constructive, is necessary to perfect the title of the buyer as against bona fide subsequent purchasers and attaching creditors,¹²⁹ and the question how far delivery is essential to transfer title is to be distinguished from the question how far retention of possession by the seller is fraudulent.

It is to be observed that many of the statutes which deal with the effect of retention of possession include bona fide purchasers among those as to whom the sale is to be deemed fraudulent.¹³⁰

¹²⁶ See *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 360.

¹²⁷ *McKibbin v. Martin*, 64 Pa. 352, 3 Am. Rep. 588; *Lehr v. Brodbeck*, 192 Pa. 535, 43 Atl. 1006, 73 Am. St. Rep. 828.

¹²⁸ Sales Act, § 26, does not attempt to lay down a uniform rule as to the effect of retention of possession, but simply provides in effect that, if under the local rule the retention is fraudulent, the sale is void as to creditors.

¹²⁹ Post, p. 204.

¹³⁰ Thus the Minnesota statute provides: "Every sale by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same is accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor and subsequent purchasers in good faith, unless those claiming under such sale or assignment make it appear that the same was made in good faith, and without any intent to hinder, delay, or defraud such creditors or purchasers." Rev. Laws 1905, § 3496.

Who are Creditors.

A sale may be fraudulent as to subsequent as well as existing creditors; and, if it is fraudulent as to existing creditors, it may be avoided by subsequent creditors.¹⁸¹ The term "creditors" includes persons having claims sounding in tort.¹⁸²

Effect of Fraud.

Sales which are fraudulent as to creditors are nevertheless valid between the parties, who are not allowed to defeat them by alleging their own fraud.¹⁸³ And, although the statute declares that such sales shall be void, they are in fact merely voidable, at the option of the defrauded creditors. And, therefore, as in the case of sales voidable by one of the parties for the fraud of the other, bona fide purchasers for value from the fraudulent buyer before avoidance acquire an indefeasible title.¹⁸⁴ A further illustration of the voidable character of the transaction is the right which the buyer has to purge it of the fraud by the payment, before avoidance, of an adequate consideration.¹⁸⁵

¹⁸¹ *Day v. Cooley*, 118 Mass. 524; *McLane v. Johnson*, 43 Vt. 48; *Hook v. Mowre*, 17 Iowa, 195; *Jones v. King*, 86 Ill. 225; *Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562; *Byrnes v. Volz*, 53 Minn. 110, 54 N. W. 942.

¹⁸² *Damon v. Bryant*, 2 Pick. (Mass.) 411; *Jackson v. Myers*, 18 Johns. (N. Y.) 425. A wife suing for a divorce and alimony is a "creditor." *Byrnes v. Volz*, 53 Minn. 110, 54 N. W. 942. See, also, *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708.

¹⁸³ *Dyer v. Homer*, 22 Pick. (Mass.) 253; *Harvey v. Varney*, 98 Mass. 118; *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; *Telford v. Adams*, 6 Watts (Pa.) 429; *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370; *Springer v. Drosch*, 32 Ind. 486, 2 Am. Rep. 356; *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520; *Butler v. Moore*, 73 Me. 151, 40 Am. Rep. 348; *Gary v. Jacobson*, 55 Miss. 204, 30 Am. Rep. 514. Contra: *Nellis v. Clark*, 20 Wend. (N. Y.) 24; *Id.*, 4 Hill (N. Y.) 424; *Church v. Mulr*, 33 N. J. Law, 318; *Gross v. Gross*, 94 Wis. 124, 68 N. W. 469.

¹⁸⁴ *Bean v. Smith*, 2 Mason (U. S.) 252, Fed. Cas. No. 1,174; *Green v. Tanner*, 8 Metc. (Mass.) 411; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Neal v. Williams*, 18 Me. 391; *Comey v. Pickering*, 63 N. H. 128; *Gordon v. Ritenour*, 87 Mo. 54.

¹⁸⁵ *Oriental Bank v. Haskins*, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; *Hutchins v. Sprague*, 4 N. H. 460, 17 Am. Dec. 439; *Bean v. Smith*, 2 Mason (U. S.) 252, 278, Fed. Cas. No. 1,174. Contra: *Merrill v. Meachum*, 5 Day (Conn.) 841; *Preston v. Crofut*, 1 Conn. 527, note; *Roberts v. Anderson*, 3 Johns. Ch. (N. Y.) 371.

**HOW FAR DELIVERY IS ESSENTIAL TO TRANSFER OF
PROPERTY AGAINST CREDITORS AND PUR-
CHASERS.**

60. In some states, in exception to the general principle that delivery is not essential to the transfer of the property, a rule prevails that delivery is essential to such transfer as against bona fide purchasers and attaching creditors without notice.

While it is universally held that delivery is not necessary to transfer the property in the goods sold as between seller and buyer,¹⁸⁶ a rule prevails in some states, as has already been pointed out, that delivery is necessary to transfer the property as against subsequent purchasers and attaching creditors without notice of the prior sale. A discussion of this rule, though logically falling under the head of the transfer of the property, can more conveniently be made here.

The question how far delivery is essential to a transfer of the property against purchasers and attaching creditors is to be distinguished from the question how far retention of possession is fraudulent as to creditors.¹⁸⁷ Even in jurisdictions which agree upon the rule that delivery is necessary for a transfer of the property against purchasers and attaching creditors, varying rules prevail as to the effect of retention of possession as evidence of fraud.¹⁸⁸ The leading case in support of the rule that delivery is necessary to transfer the property as against subsequent purchasers and attaching creditors is *Lan-*

¹⁸⁶ Ante, p. 121 et seq.

¹⁸⁷ Ante, p. 200.

¹⁸⁸ For example, in Massachusetts, the continuance of the seller in possession is not of itself enough to render the sale void as fraudulent, but is a fact to be considered as evidence of fraud, which may be rebutted by proof that it was a sale for value and in good faith, and that possession was retained under an agreement not inconsistent with honesty in the transaction. *Brooks v. Powers*, 15 Mass. 247, 8 Am. Dec. 99; *Shurtleff v. Willard*, 19 Pick. 202, 211; *Green v. Rowland*, 16 Gray, 58; *Usher, Sales*, § 292; and cf. *Id.* § 140 et seq. The rule in Maine is the same. *Reed v. Jewett*, 5 Greenl. (Me.) 96. In New Hampshire, if the seller fails to explain the want of change, it is conclusive evidence of fraud. *Coburn v. Pickering*, 8 N. H. 428; *Ooolidge v. Melvin*, 42 N. H. 516. See 19 Harv. Law Rev. pp. 569, 570.

fear v. Sumner,¹³⁹ in which an assignment of tea then on a ship at sea was made to a bona fide creditor, and upon its arrival, and before the assignee could take possession, the tea was attached by a second creditor without notice of the prior assignment. In an action of trover by the assignee against the sheriff, who levied the attachment, it was held that the want of delivery was fatal to the plaintiff's title. The court said: "Delivery of possession is necessary in a conveyance of personal chattels as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold against the other." This case has been followed in Massachusetts¹⁴⁰ and some other states,¹⁴¹ though the rule is opposed to the general principle, elsewhere recognized, that delivery is not essential to a transfer of the property.¹⁴² A leading case against this rule is Meade v. Smith,¹⁴³ in which the seller gave a bill of sale to the buyer, both parties being in New York, and the buyer went at once to Connecticut, where the goods were, to take possession, but in the meantime they had been attached by a creditor of the seller without notice of the prior sale, and it was held that the sale was not invalid for lack of delivery, there being no want of diligence on the part of the buyer in taking possession. "This claim proceeds," said Storrs, J., "on the ground, not that the want of a change of possession furnishes evidence of fraud in the sale, and that but for such

¹³⁹ 17 Mass. 110, 9 Am. Dec. 119.

¹⁴⁰ *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433.

¹⁴¹ *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Reed v. Reed*, 70 Me. 504; *Cummings v. Gilman*, 90 Me. 524, 38 Atl. 538; *Crawford v. Forristall*, 58 N. H. 114; *Burnell v. Robertson*, 5 Gilman (Ill.) 282; *Huschle v. Morris*, 131 Ill. 587, 23 N. E. 643. See, also, *Jewett v. Lincoln*, 14 Me. 116, 31 Am. Dec. 36; *Winslow v. Leonard*, 24 Pa. 14, 62 Am. Dec. 354; *Kirven v. Pinckney*, 47 S. C. 229, 25 S. E. 202.

¹⁴² *Ante*, p. 121. See *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433; *per Holmes, J.*; *Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052.

¹⁴³ 16 Conn. 346. This case seems not inconsistent with the rule prevailing in Connecticut that retention of possession is usually conclusive evidence of fraud. See *Hatstat v. Blakeslee*, 41 Conn. 301.

fraud the property would pass to the vendee, as against such purchasers and creditors, but that, as to them, there is no transfer of the property notwithstanding there be no fraud by reason of such want of possession; in other words, that as to them, before such change of possession, the title of the vendee is merely inchoate and incomplete." And the decision rests upon the ground that "want of delivery to, or of the continuance of possession by, the vendee, is in no case considered in any other light than as furnishing evidence of fraud in the sale; and where, for want of such delivery or continuance of possession, the sale has been pronounced void, it was only on the ground of such fraud."

The rule requiring delivery, unlike that which makes retention of possession evidence of fraud, does not operate in favor of purchasers or creditors who have notice of the sale.¹⁴⁴ It is to be observed that, so far as concerns bona fide purchasers, the law in England has been changed by statute, and the rule now is in effect that, while delivery is not necessary as between the parties, it is necessary as against such purchasers.¹⁴⁵

What Constitutes Delivery.

Where the rule of *Lanfear v. Sumner* prevails, if the transfer is bona fide and for a valuable consideration, very slight evidence is necessary to give a preference to a bona fide buyer as against an attaching creditor of the seller.¹⁴⁶ If the buyer obtains possession before any attachment or second sale, the transfer is complete without formal delivery.¹⁴⁷ A delivery of a part in token of the whole is a sufficient constructive delivery,

¹⁴⁴ *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245; *Haskell v. Greely*, 3 Greenl. (Me.) 425. But notice to the officer holding the writ before service, but uncommunicated to the attaching creditor, is not notice to such creditor. *McKee v. Garcelon*, 60 Me. 165, 11 Am. Rep. 200.

¹⁴⁵ Sale of Goods Act, § 25 (1). This change was first introduced by the Factors' Act of 1889 (St. 52 & 53 Vict. c. 45, § 8). This section is substantially followed in the proposed American Sales Act, § 25. Ante, p. 32.

¹⁴⁶ *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; *Hardy v. Potter*, 10 Gray (Mass.) 89; *Stinson v. Clark*, 6 Allen (Mass.) 340; *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 300; *In re Pease Car & Locomotive Works* (D. C.) 134 Fed. 919.

¹⁴⁷ *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

although the goods are in the possession of various persons.¹⁴⁸ And where there can be no manual delivery, as in the case of goods at sea, a symbolical delivery, as of a bill of lading, is a good delivery.¹⁴⁹ So the delivery of a bill of sale of a ship at sea is valid, provided the buyer takes actual possession as soon as he reasonably can.¹⁵⁰ The delivery of the key of a warehouse where the goods are stored is a good delivery.¹⁵¹ If the goods are in the possession of the seller, it is enough if he agrees to hold as bailee for the buyer.¹⁵² If they are in the possession of a third person, it is enough if notice of the sale is given to him and he does not dissent.¹⁵³ But the mere delivery of a bill of sale without delivery, actual or constructive, is not enough.¹⁵⁴ Some of these cases are hard to reconcile with the statement of Holmes, J., in a recent case,¹⁵⁵ that the delivery required by the rule in *Lanfear v. Sumner* is delivery in its natural sense,—that is, change of possession,—for it is generally held, in connection with other branches of sale, that mere notice to a bailee without his attornment does not constitute delivery. In the latter case it was held that the indorsement and delivery by the bailor of a receipt for goods stored in a private warehouse, making the goods deliverable to the bailor on the payment of charges, but not to his order, did not pass the title as against a creditor attaching the goods before notice to and attornment by the bailee.

¹⁴⁸ *Legg v. Willard*, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; *Hobbs v. Carr*, 127 Mass. 532. And see *Parry v. Libbey*, 166 Mass. 112, 44 N. E. 124.

¹⁴⁹ *Pratt v. Parkman*, 24 Pick. (Mass.) 42.

¹⁵⁰ *Carter v. Willard*, 19 Pick. (Mass.) 1, 9, 11; *Conard v. Insurance Co.*, 1 Pet. (U. S.) 386, 389, 7 L. Ed. 189; *Wheeler v. Sumner*, 4 Mason (U. S.) 183, Fed. Cas. No. 17,501.

¹⁵¹ *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Vining v. Gilbreth*, 39 Me. 496.

¹⁵² See *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 360.

¹⁵³ *Carter v. Willard*, 19 Pick. (Mass.) 1; *Russell v. O'Brien*, 127 Mass. 349. And see *Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341.

¹⁵⁴ *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Farrar v. Smith*, 64 Me. 74.

¹⁵⁵ *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433. See, also, *Gill v. Frank*, 12 Or. 507, 8 Pac. 764, 53 Am. Rep. 878.

CHAPTER VI**ILLEGALITY.**

- 61-62. In General.
- 63-64. Sales Prohibited by Common Law.
- 65. Sales Prohibited by Statute.
- 66-68. Effect of Illegality.
- 69. Conflict of Laws.

IN GENERAL.

- 61. An agreement is not enforceable at law, and therefore does not result in a contract, if its object is illegal.
- 62. CLASSIFICATION OF UNLAWFUL SALES. Unlawful sales may be classified as sales prohibited by—
 - (a) The common law, or
 - (b) Statute.

To result in a contract, an agreement must create an obligation; and it does not create an obligation if it be such that the courts cannot enforce it. An agreement, therefore, which is illegal or unlawful, is in fact no contract at all, although it is often spoken of as an illegal contract.¹ Certain limitations are imposed by law upon the freedom of contract. Certain contracts of sale, either because of the subject-matter of the sale, or because of the purpose for which the sale is entered into, or because certain requirements of the law have not been complied with, or because of other reasons, are prohibited. If an agreement to sell contemplates an illegal sale, the law will not enforce the agreement, although all the other elements necessary to the formation of a valid contract may be present. If the agreement has been executed, by the delivery of the goods or the payment of the price, the court will not as a rule lend its aid to either party to recover what he has paid or delivered. The effect of the illegality upon the rights of the parties, however, will be considered later.²

The modes in which the law expresses its disapproval of

¹ Clark, *Cont.* (2d. Ed.) 254.

² Post, p. 219.

certain contracts may be roughly described as prohibition (1) by express rules of the common law; (2) through the interpretation of the courts of the policy of the law; and (3) by statute. The first two are not easy to distinguish because certain of the rules which have been formulated by the courts on matters of public policy have become in effect rules of the common law.³ So far as concerns the law of sales, the subject may be discussed under the first and third heads.

SALES PROHIBITED BY COMMON LAW.

63. An agreement to sell is illegal at common law if the thing to be sold is in itself contrary to good morals or decency.

64. Although the thing to be sold is innocent in itself, the agreement is illegal—

- (a) **If it provides that the thing is to be applied to an illegal purpose.**
- (b) **If the buyer intends to apply the thing to an illegal purpose, and the seller does some act in aid of such purpose.**
- (c) **If the buyer intends to apply the thing to a purpose involving a heinous crime, and the seller knows of such intention.**
- (d) **In some states, if the sale is made by the seller with a view to the buyer's illegal purpose.**

In most jurisdictions, mere knowledge on the seller's part that the buyer intends to apply the thing to an illegal purpose does not render the sale illegal.

Sale of Things Contrary to Good Morals.

A general rule of the common law is summed up in the maxim, "Ex turpi causa non oritur actio." Therefore the sale of a thing which is in itself contrary to good morals or public decency cannot become the basis of an action. Sales of an obscene book,⁴ and of indecent prints or pictures,⁵ have been de-

³ Anson, *Cont.* 163; Clark, *Cont.* (2d Ed.) 255. Sales prohibited by public policy are said to include: (1) Sales of offices; (2) sales by which the seller is unreasonably restrained in carrying on his trade; and (3) sales of lawsuits. These subjects have little connection with the sale of goods, and need not be here considered. See Benj. Sales, §§ 512-529; Clark, *Cont.* (2d Ed.) 281 et seq.

⁴ *Poplett v. Stockdale*, Ryan & M. 337.

⁵ *Fores v. Johns*, 4 Esp. 97.

clared illegal and void at common law,⁶ although upon this point there have been few decisions.

Sale of Innocent Thing for Unlawful Purpose.

Whether the sale of a thing in itself an innocent and proper article of commerce, when the seller knows that it is intended to be used for an immoral or illegal purpose, is valid, is a question on which the authorities disagree, although the decisions in this country are fairly reconcilable.

The earlier English cases held that something more than mere knowledge on the part of the seller of the illegal purpose was necessary, and that there must be evidence of an intention on his part to aid in the illegal purpose or to profit by the immoral act.⁷ Thus, where clothes were sold to a prostitute, with knowledge that they were for the purpose of enabling her to pursue her calling, it was held that this was not enough, but that it must appear that the seller expected to be paid out of the profits of her prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.⁸ And so, in an action for the price of spirits sold with knowledge that the defendant intended to use them illegally, it was held that the plaintiff could recover, since to deprive him of his right to payment, it was necessary that he should be a sharer in the illegal transaction.⁹ But the later English cases overrule this distinction, and hold that the sale is void if the seller knows of the illegal purpose.¹⁰ Thus, where the plaintiff supplied a brougham to a prostitute, it was held not necessary to show that he expected to be paid from the proceeds of her calling; that his knowledge of her calling justified the jury in inferring knowledge of her purpose; and that this knowledge rendered the agreement void.¹¹

In the United States the cases, on the whole, follow substan-

⁶ Benj. Sales, § 504.

⁷ Benj. Sales, § 506 et seq.

⁸ Bowry v. Bennet, 1 Camp. 348.

⁹ Hodgson v. Temple, 5 Taunt. 181.

¹⁰ Pearce v. Brooks, L. R. 1 Exch. 213; Cannan v. Bryce, 3 Barn. & Ald. 179. See, also, McKinnell v. Robinson, 3 Mees. & W. 435; Anson, Cont. 192; Clark, Cont. (2d Ed.) 827.

¹¹ Pearce v. Brooks, L. R. 1 Exch. 213.

tially the earlier English doctrine, and hold that mere knowledge of the buyer's unlawful purpose does not invalidate the sale,¹² though all agree that the sale is void if it be a part of the contract of sale that the goods are to be used for an illegal purpose,¹³ or if the seller does any act in aid of the buyer's unlawful intention, as when he packs goods in a manner convenient for smuggling, or conceals the form of liquor so as to enable the buyer to evade the law,¹⁴ or marks domestic sardines as French to assist the buyer in selling them as such.¹⁵ It is frequently said, however, that knowledge of the buyer's purpose to use the goods in the commission of a crime which is not merely *malum prohibitum* or of inferior criminality stands

¹² *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Sortwell v. Hughes*, 1 Curt. (U. S.) 244, Fed. Cas. No. 13,177; *Green v. Collins*, 3 Cliff. (U. S.) 494, Fed. Cas. No. 5,755; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Tuttle v. Holland*, 43 Vt. 542; *Cheney v. Duke*, 10 Gill & J. 11; *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516; *Bickel v. Sheets*, 24 Ind. 1; *Webber v. Donnelly*, 33 Mich. 469; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *Anheuser-Busch Brewing Ass'n v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; *J. M. Brunswick & Balke Co. v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *McKinney v. Andrews*, 41 Tex. 363; *Delavina v. Hill*, 65 N. H. 94, 19 Atl. 1000; *Gambs v. Sutherland's Estate*, 101 Mich. 355, 59 N. W. 652. *McIntyre v. Parks*, 3 Metc. (Mass.) 207, is in line with these decisions. See, also, *Dater v. Earl*, 3 Gray (Mass.) 482. But there are strong intimations in the later Massachusetts cases that the law is the other way. *Sult v. Woodhall*, 118 Mass. 301, 395; *Finch v. Mansfield*, 97 Mass. 89, 92; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446, per Holmes, J.; *Clark, Cont.* (2d Ed.) 328. See, also, *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 900; *St. Louis Fair Ass'n v. Carmody*, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571.

¹³ *Tracy v. Talmage*, 14 N. Y. 162, 176, 67 Am. Dec. 132; *Green v. Collins*, 3 Cliff. (U. S.) 494, 501, Fed. Cas. No. 5,755; *Clark, Cont.* 481.

¹⁴ *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Alken v. Blaisdell*, 41 Vt. 655; *Skiff v. Johnson*, 57 N. H. 475; *Banchor v. Mansel*, 47 Me. 58; *Kohn v. Melcher* (O. C.) 43 Fed. 641, 10 L. R. A. 439; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Arnot v. Coal Co.*, 68 N. Y. 566, 23 Am. Rep. 190; *Waymell v. Reed*, 5 Term R. 599.

¹⁵ *Materne v. Horwitz*, 50 N. Y. Super. Ct. 41; *Id.*, 101 N. Y. 469, 5 N. E. 331.

on a different footing.¹⁶ Thus knowledge that goods were to be used in aid of rebellion has been held to avoid their sale.¹⁷ A few authorities, which are scarcely to be reconciled with the weight of authority in this country, hold that the sale is void if made "with a view to" the illegal purpose, or with the intention of enabling the buyer to accomplish it;¹⁸ but if the contract does not provide for such purpose, and the seller's connection with the transaction is confined to a sale of the goods, it is difficult to see how any line between mere knowledge of the purpose and conduct in aid of it can practically be drawn.

¹⁶ *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 20 L. Ed. 439; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Howell v. Stewart*, 54 Mo. 400; *Russell v. Post*, 138 U. S. 425, 11 Sup. Ct. 353, 34 L. Ed. 1009.

¹⁷ *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 20 L. Ed. 439; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717. By the common law, sales to an alien enemy are void. *Brandon v. Nesbitt*, 6 Term R. 23; *Potts v. Bell*, 8 Term R. 548; *U. S. v. Lapene*, 17 Wall. (U. S.) 601, 21 L. Ed. 693; *Bank of New Orleans v. Mathews*, 49 N. Y. 12.

¹⁸ *Webster v. Munger*, 9 Gray (Mass.) 584; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; *Davis v. Bronson*, 6 Iowa, 410. "When a sale of intoxicating liquors in another state has just so much greater approximation to a breach of the Massachusetts law as is implied in the statement that it is made with a view to such a breach, it is void. *Webster v. Munger*, 9 Gray (Mass.) 584; *Orcutt v. Nelson*, 1 Gray (Mass.) 536, 541; *Hubbell v. Flint*, 13 Gray (Mass.) 277, 279; *Adams v. Couillard*, 102 Mass. 167, 172, 173. * * * If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale. * * * We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. * * * The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. * * * If the sale is made with the desire to help him (the buyer) to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller while aware of his intent is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. It appears to us not unreasonable to draw the line as was drawn in *Webster v. Munger*, 9 Gray (Mass.) 584, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale, as just explained, the sale is void." *Graves v. Johnson*, *supra*, per *Holmes, J.* See, also, *Wasserboehr v. Morgan*, 168 Mass. 291, 47 N. E. 126.

SALES PROHIBITED BY STATUTE.

65. Among statutes prohibiting sales the following are the most important:

- (a) Statutes regulating the conduct of trades in certain commodities, or requiring a license of persons engaged in certain kinds of business, and, by implication, prohibiting sales where the statutory provisions have not been complied with.**
- (b) Statutes prohibiting absolutely or conditionally the sale of intoxicating liquors.**
- (c) Statutes prohibiting sales on Sunday.**
- (d) Statutes prohibiting wagers. This subdivision includes statutes prohibiting the selling of goods for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price.**

Where contracts are prohibited by statute, the prohibition is sometimes express and sometimes implied, and in either case the agreement cannot be enforced. The usual way by which contracts are prohibited by implication is by the imposition of a penalty. Some cases hold that, whenever a statute imposes a penalty for an act or omission, it impliedly prohibits the same;¹⁹ but, by the weight of authority, the imposition of a penalty is only *prima facie* evidence of the intention to prohibit. The intention of the legislature will always govern, and the court will look to the language and subject-matter of the act and to the evil which it seeks to prevent.²⁰ A consideration which receives great weight is whether the object of the penalty is protection to the public as well as revenue; for, if the penalty is designed to further the interests of public policy, it

¹⁹ *Miller v. Post*, 1 Allen (Mass.) 434; *Pray v. Burbank*, 10 N. H. 377; *Hallett v. Novlon*, 14 Johns. (N. Y.) 273; *Durgin v. Dyer*, 68 Me. 143; *Bancroft v. Dumas*, 21 Vt. 456; *Mitchell v. Smith*, 1 Bin. (Pa.) 110, 2 Am. Dec. 417; *Bacon v. Lee*, 4 Iowa, 490.

²⁰ *Cope v. Rowlands*, 2 Mees. & W. 149; *Miller v. Ammon*, 145 U. S. 421, 426, 12 Sup. Ct. 884, 36 L. Ed. 759; *Harris v. Runnels*, 12 How. (U. S.) 79, 84, 13 L. Ed. 901; *Bowditch v. Insurance Co.*, 141 Mass. 292, 295, 4 N. E. 798, 55 Am. Rep. 474; *Pangborn v. Westlake*, 36 Iowa, 540; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Clark*, Cont. (2d Ed.) 260.

amounts to a prohibition;²¹ but, if it is designed solely for revenue purposes, the contract is not necessarily prohibited.²² A second consideration, which sometimes receives weight, is whether the penalty is recurrent upon every breach of the provisions of the statute, for, if it is recurrent, the inference is that the penalty amounts to a prohibition.²³

Statutes Regulating Trade.

There are numerous statutes enacted for the purpose of protecting the public in business dealings, which generally impose a penalty for noncompliance with their provisions, and which are construed as prohibiting sales on the part of dealers who have failed to comply with them. Among these statutes may be mentioned statutes requiring dealers to have their weights, measures, or scales approved or sealed;²⁴ statutes requiring goods to be marked in a particular way,²⁵ or to be inspected,²⁶ or to conform to a certain weight or to certain dimensions,²⁷ or to be officially weighed or measured,²⁸ or to be

²¹ *Cope v. Rowlands*, 2 Mees. & W. 149; *Cundell v. Dawson*, 4 C. B. 376; *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Seldenbender v. Charles*, 4 Serg. & R. (Pa.) 150; *Penn v. Bornman*, 102 Ill. 523; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Clark*, Cont. (2d Ed.) 261.

²² *Brown v. Duncan*, 10 Barn. & C. 93; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Corning v. Abbott*, 54 N. H. 460; *Alken v. Blaisdell*, 41 Vt. 655; *Ruckman v. Bergholz*, 37 N. J. Law, 437; *Rahter v. Bank*, 92 Pa. 393; *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433.

²³ *Ritchie v. Smith*, 6 C. B. 462; *Benj. Sales*, § 533.

²⁴ *Miller v. Post*, 1 Allen (Mass.) 434; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Finch v. Barclay*, 87 Ga. 393, 13 S. E. 566. See, generally, as to statutes regulating a trade or business, *Clark*, Cont. (2d Ed.) 263.

²⁵ *Forster v. Taylor*, 5 Barn. & Adol. 887; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845.

²⁶ Requiring fertilizers to be inspected or labeled. *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Conley v. Sims*, 71 Ga. 161; *Baker v. Burton* (C. C.) 31 Fed. 401; *Williams v. Barfield* (C. C.) 31 Fed. 398; *Campbell v. Segars*, 81 Ala. 259, 1 South. 714. But see *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720.

²⁷ *Law v. Hodson*, 11 East, 300; *Wheeler v. Russell*, 17 Mass. 258.

²⁸ *Pray v. Burbank*, 10 N. H. 377; *Libby v. Downey*, 5 Allen (Mass.) 299.

sold by weight and not by measure, or vice versa;²⁰ and statutes requiring dealers to take out a license.²¹ The effect of noncompliance by the seller with such statutes is to preclude him from recovering the price.

Statutes Regulating Sale of Intoxicating Liquor.

Where a statute prohibits the sale of liquor absolutely, a contract of sale is, of course, invalid. But, whether absolutely prohibitory or not, such statutes are construed as intended, not merely for revenue, but to diminish the evils of intemperance. Therefore, where the statute simply imposes a penalty for selling without license, the sale is void.²²

Statutes Prohibiting Sunday Sales.

At common law, sales, like other contracts entered into on Sunday, are valid.²³ In later times, however, statutes have been passed in England, and in most of the states, prohibiting certain acts on Sunday, and whether sales are included in the prohibition depends upon the terms of the particular act. Where the statute prohibits the making of contracts, sales are, of course, included. And sales are included where the prohibition is against labor, work, and business, since the making of contracts is secular business;²⁴ but they are not included if the

²⁰ *Eaton v. Kegan*, 114 Mass. 433.

²¹ *Cope v. Rowlands*, 2 Mees. & W. 149; *Johnson v. Hullings*, 103 Pa. 498, 49 Am. Rep. 131; *Buckley v. Humason*, 50 Minn. 193, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637.

²² *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Alken v. Blaisdell*, 41 Vt. 655; *Lewis v. Welch*, 14 N. H. 294; *Cobb v. Billings*, 23 Me. 470; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. 527; *Bach v. Smith*, 2 Wash. T. 145, 3 Pac. 831. And see *Clark*, Cont. (2d Ed.) 265.

²³ *Drury v. Defontaine*, 1 Taunt. 131; *Richardson v. Goddard*, 23 How. (U. S.) 29, 42, 16 L. Ed. 412; *Adams v. Gay*, 19 Vt. 358; *Bloom v. Richards*, 2 Ohio St. 387; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Brown v. Browning*, 15 R. I. 423, 7 Atl. 403, 2 Am. St. Rep. 908.

²⁴ *Pattee v. Greely*, 13 Metc. (Mass.) 284; *Northrup v. Foot*, 14 Wend. (N. Y.) 249; *Towle v. Larrabee*, 26 Me. 464; *Varney v. French*, 19 N. H. 233; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; *Durant v. Rhener*, 26 Minn. 362, 4 N. W. 610; *Clark*, Cont. (2d Ed.) 265.

prohibition is merely against labor.³⁴ Again, if the prohibition is confined to labor, work, or business of a man's "ordinary calling," a sale not in the exercise of such calling is valid.³⁵ If the law prohibits exposure of merchandise for sale, the prohibition extends only to public sales.³⁶

Same—Ratification of Sunday Sale.

Whether a Sunday sale is capable of ratification is a question on which there is much conflict of authority. A leading case on the point is *Williams v. Paul*,³⁷ in which there was a subsequent promise to pay for the goods, on the strength of which it was held that an action could be maintained; but this decision was questioned by Parke, B.,³⁸ on the ground that the contract was incapable of ratification, and that the property in the goods having passed by delivery, the promise to pay for them was without consideration. If it is correct to say that the property passes in such case, this criticism appears to be unanswerable; but there is some authority to the effect that the property does not pass, and that, if the goods have not been paid for, the seller can maintain replevin or trover,³⁹ in which case sufficient consideration for the new promise may be found. In this country the cases are in direct conflict, some holding that a Sunday contract can be ratified⁴⁰ and others holding that

³⁴ *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Birks v. French*, 21 Kan. 233. Contra, *Reynolds v. Stevenson*, 4 Ind. 619.

³⁵ *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, 3 Barn. & C. 232; *Scarfe v. Morgan*, 4 Mees. & W. 270; *Allen v. Gardiner*, 7 R. I. 22; *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790; *Swann v. Swann* (C. C.) 21 Fed. 299; *Amls v. Kyle*, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; *Sanders v. Johnson*, 29 Ga. 526; *Mills v. Williams*, 16 S. C. 593; *Clark*, Cont. (2d Ed.) 266. But see *Fennell v. Ridler*, 5 Barn. & C. 406; *Smith v. Sparrow*, 4 Bing. 84.

³⁶ *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965. See, also, *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531; *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127; *Clark*, Cont. (2d Ed.) 267.

³⁷ 6 Bing. 653.

³⁸ *Simpson v. Nicholls*, 3 Mees. & W. 244, as corrected 5 Mees. & W. 702.

³⁹ Post, p. 221.

⁴⁰ *Adams v. Gay*, 19 Vt. 360; *Flinn v. St. John*, 51 Vt. 334, 345; *Sayles v. Wellman*, 10 R. I. 465; *Banks v. Werts*, 13 Ind. 203; *Tucker*

it cannot.⁴¹ So also the cases are conflicting on the question whether an action can be maintained when there is a subsequent promise to pay.⁴² If the sale is made on Sunday, but the goods are not delivered until a week day, the buyer is liable, not on the original promise, but on an implied promise to pay for the goods.⁴³

Wagering Contracts.

At common law, wagers that did not violate any rule of public decency or morality or any recognized principle of public policy were not prohibited,⁴⁴ although in many of the states of the Union wagering contracts on matters in which the parties have no interest have been held contrary to public policy and unenforceable.⁴⁵ By statute to-day, in England, and in most, if not all, of the states, contracts by way of wagering and gaming are declared void. Therefore, a bet in the form of a sale, as the sale of a horse for \$50 if H. G. is elected president, and for \$500 if U. S. G. is elected, is invalid.⁴⁶

v. West, 29 Ark. 386; Campbell v. Young, 9 Bush (Ky.) 240; Gwinn v. Simes, 61 Mo. 335; Smith v. Case, 2 Or. 190; Cook v. Forker, 198 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699; Tennent-Stribling Shoe Co. v. Roper, 94 Fed. 730, 38 C. O. A. 455.

⁴¹ Day v. McAllister, 15 Gray (Mass.) 433; Tillock v. Webb, 56 Me. 100; Plaisted v. Palmer, 63 Me. 576; Grant v. McGrath, 56 Conn. 333, 15 Atl. 370; Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Riddle v. Keller, 61 N. J. Eq. 513, 48 Atl. 818; Acme Electrical Illustrating & Advertising Co. v. Van Derbeck, 127 Mich. 341, 86 N. W. 786; Clark, Cont. (2d Ed.) 269, collecting cases.

⁴² Harrison v. Colton, 31 Iowa, 16; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605. See Winchell v. Carey, 115 Mass. 560, 15 Am. Rep. 151. Contra: Boutelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152; Kountz v. Price, 40 Miss. 341. Post, p. 221.

⁴³ Bradley v. Rea, 14 Allen (Mass.) 20; Id., 103 Mass. 188, 4 Am. Rep. 524; Foreman v. Ahl, 55 Pa. 325; Hopkins v. Stefan, 77 Wis. 45, 45 N. W. 676; Bollin v. Hooper, 127 Mich. 287, 86 N. W. 795. See, also, Flynn v. Columbus Club, 21 R. I. 534, 45 Atl. 551. The delivery must be under circumstances showing a contract. Aspell v. Hosbein, 98 Mich. 117, 57 N. W. 27.

⁴⁴ Anson, Cont. 166; Benj. Sales, § 542; Clark, Cont. (2d Ed.) 276.

⁴⁵ Irwin v. Williar, 110 U. S. 490, 510, 4 Sup. Ct. 160, 166, 28 L. Ed. 225, and cases cited; Clark, Cont. (2d Ed.) 276.

⁴⁶ Harper v. Crain, 36 Ohio St. 338, 38 Am. Rep. 589; Bates v. Clifford, 22 Minn. 52.

Same—Futures.

The principal question that arises in the law of sales in connection with the subject of wagers is whether an executory contract for the sale of goods is not a device for gaming. As has been stated,⁴⁷ a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods or any means of getting them except that of buying them in the market. But such a contract is valid only provided the parties really intend and agree that the goods are to be delivered by the seller, and that the price is to be paid by the buyer. If under the guise of such a contract, the real intent is merely to speculate in the rise and fall of prices, and the actual agreement is that the goods are not to be delivered, but that one party is to pay to the other the difference between the contract price and the market price of the goods, at the date fixed for the performance of the contract, then the whole contract constitutes nothing more than a wager, and is null and void.⁴⁸ But the contract does not become a wagering contract simply because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute a settlement by payment of the difference between the contract price and the market price, so long as it

⁴⁷ Ante, p. 49.

⁴⁸ *Grizewood v. Blane*, 11 C. B. 526; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Brua's Appeal*, 55 Pa. 294; *Burt v. Myer*, 71 Md. 467, 18 Atl. 796; *Lawton v. Blitch*, 83 Ga. 663, 10 S. E. 353; *McGrew v. Produce Exchange*, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Cockrell v. Thompson*, 85 Mo. 510; *Mohr v. Mlesen*, 47 Minn. 228, 49 N. W. 862; *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. 573; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383; *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34; *Johnston v. Miller*, 67 Ark. 172, 53 S. W. 1052; *Ponder v. Cotton Co.*, 100 Fed. 373, 40 C. C. A. 416; *Morris v. Telegraph Co.*, 94 Me. 423, 47 Atl. 926; *Atwater v. Manville*, 106 Wis. 64, 81 N. W. 985; *Clark*, Cont. (2d Ed.) 278.

is agreed that the contract shall be performed according to its terms if either party requires it.⁴⁹ If either party intends an actual sale, he may enforce the contract, though the other intends a wager.⁵⁰ Such intention is immaterial, except so far as it is made part of the contract, although it need not be made expressly a part of the contract.

EFFECT OF ILLEGALITY.

66. In no case can an action be maintained to enforce an illegal agreement.

67. Where an agreement has been executed in whole or in part by the payment of money or the transfer of other property, the court will not generally lend its aid to recover it back. The rule is that the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction. This rule is subject to exceptions as follows, where the action is brought, not to enforce the agreement, but in disaffirmance of it:

EXCEPTIONS—(a) In some cases a *locus poenitentiae* remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered.

(b) Where the parties are not in *pari delicto*, the one who is less guilty may recover what he has parted with.

68. If the agreement is for the sale for an entire price of various articles, some of which may and others of which may not be lawfully sold, the whole agreement is void; but, if a separate price is named for each article, so that the consideration is apportionable, the agreement may be enforced so far as it relates to the articles lawfully sold.

The courts will not lend their aid to the enforcement of an illegal agreement. "The objection," said Lord Mansfield, "that a contract is illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not

⁴⁹ *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159, per Field, J.; Clark, Cont. (2d Ed.) 279.

⁵⁰ *Pixley v. Boynton*, 79 Ill. 351; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Bangs v. Hornick* (C. C.) 30 Fed. 97.

for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the courts go; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for, where both are equally in fault, 'potior est conditio defendentis.'"⁵¹

Neither party can maintain an action on the illegal agreement, neither the seller for the price, nor the buyer for the goods, nor either to recover damages for its breach.⁵² Neither can the seller, although the goods are delivered, recover on an implied promise, since there is no ground on which a promise can be implied.⁵³ The agreement is void for all purposes, and neither party can maintain an action on a warranty or for fraudulent representations inducing the agreement.⁵⁴ But though the agreement is void, if it has been executed by the

⁵¹ *Holman v. Johnson*, 1 Cowp. 341.

⁵² *Holman v. Johnson*, 1 Cowp. 341, per Lord Mansfield; *Foster v. Thurston*, 11 Cush. (Mass.) 322; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Materne v. Horwitz*, 50 N. Y. Super. Ct. 41; *Id.*, 101 N. Y. 469, 5 N. E. 331; *Penn v. Bornman*, 102 Ill. 523; *Randon v. Toby*, 11 How. (U. S.) 493, 520, 13 L. Ed. 784; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426; *Storz v. Finklestein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644; *Ullman v. Association*, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606.

⁵³ *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Foreman v. Ahl*, 55 Pa. 325; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336; *Pike v. King*, 16 Iowa, 49.

⁵⁴ *Hulet v. Stratton*, 5 Cush. (Mass.) 539; *Robeson v. French*, 12 Metc. (Mass.) 24, 45 Am. Dec. 236; *Northrup v. Foot*, 14 Wend. (N.

delivery of the goods and the payment of the price, the court will not, as a rule, aid either party in disaffirming it. The seller cannot recover his goods, nor the buyer his money.⁵⁵ In this way possession acquired under illegal sales will often avail the buyer as a sufficient title. Neither party is allowed to impeach its validity by asserting the invalidity of his own act, and the transaction takes effect from the inability of either party to impeach it.⁵⁶ The rule applies: "In pari delicto potior est conditio defendentis."

It is not clear, however, that if the goods have been delivered, but not paid for, the seller cannot maintain an action founded on his right of property of which he has never been divested, though the authorities are conflicting. Thus, it has been held in the case of a Sunday sale that the seller can under such circumstances maintain replevin, since he can make out a case founded on property and prior right of possession without referring to the void contract,⁵⁷ and it has also been intimated that he could sue for the conversion;⁵⁸ in which case it seems that a sufficient consideration for a new promise to pay may be found in the consent of the seller to the transfer of the property at the time of such promise—the liability of the prom-

Y.) 249; *Plaisted v. Palmer*, 63 Me. 576; *Finley v. Quirk*, 9 Minn. 194 (Gil. 179), 86 Am. Dec. 93; *Gunderson v. Richardson*, 56 Iowa, 56, 8 N. W. 683, 41 Am. Rep. 81; *Smith v. Bean*, 15 N. H. 577, 578.

⁵⁵ *Myers v. Meinrath*, 101 Mass. 366, 8 Am. Rep. 368; *Horton v. Buffinton*, 105 Mass. 399; *Greene v. Godfrey*, 44 Me. 25; *Chestnut v. Harbaugh*, 78 Pa. 473; *Ellis v. Hammond*, 57 Ga. 179; *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Kinney v. McDermot*, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191; *Moore v. Kendall*, 2 Pin. (Wis.) 99, 52 Am. Dec. 145; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879.

⁵⁶ *Myers v. Meinrath*, 101 Mass. 366, 8 Am. Rep. 368, per Wells, J.

⁵⁷ *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476. See, also, *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49. Contra, *Smith v. Bean*, 15 N. H. 577, 578; *Kinney v. McDermot*, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191.

⁵⁸ *Iadd v. Rogers*, 11 Allen (Mass.) 209. See, also, *Myers v. Meinrath*, 101 Mass. 366, 369, 8 Am. Rep. 368; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Oranson v. Goss*, 107 Mass. 439, 441, 9 Am. Rep. 45.

isor resting, however, upon a new contract, and not upon a ratification of the original contract.⁵⁹

Disaffirmance before Execution of Illegal Purpose.

It is a general rule that where money has been paid upon an agreement whose object, although illegal, has not been in other respects carried out by performance, the party who has paid the money may disaffirm the contract, and recover the money in an action for money had and received.⁶⁰ Thus, where a corporation passed a resolution increasing its capital stock in violation of the law, and the plaintiff agreed to take certain shares of the new stock when issued, and paid an installment thereon, but the stock was never actually increased, nor were certificates issued, the court held that, conceding the illegality of the contract, the plaintiff was entitled to recover the money paid by him in part performance, the defendant not having performed any part of the agreement, and both parties having abandoned the illegal agreement before it was consummated.⁶¹ The rule was stated in a leading English case⁶² as follows: "If money is paid, or goods delivered, for an illegal purpose,

⁵⁹ *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *Haacke v. Literary Club*, 76 Md. 429, 25 Atl. 422; *Brewster v. Banta*, 66 N. J. Law, 367, 49 Atl. 718. An action may be maintained on a new promise. *Williams v. Paul*, 6 Bing. 653; *Harrison v. Colton*, 31 Iowa, 16; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 606. See *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151. Contra: *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152; *Kountz v. Price*, 40 Miss. 341.

⁶⁰ *Taylor v. Bowers*, 1 Q. B. Div. 291; *Barclay v. Pearson* [1898] 2 Ch. 154; *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *White v. Bank*, 22 Pick. (Mass.) 181, 189; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Peters v. Grim*, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Adams Exp. Co. v. Reno*, 48 Mo. 204; *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 88 L. R. A. 176, 59 Am. St. Rep. 209; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614. Cf. *Ullman v. Association*, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606; *Kearley v. Thompson*, 24 Q. B. Div. 742, 746. Contra: *Knowlton v. Spring Co.*, 57 N. Y. 518, *Dwight, C.*, dissenting. *Benj. Sales*, § 503a; *Clark, Cont.* (2d Ed.) 338.

⁶¹ *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

⁶² *Taylor v. Bowers*, 1 Q. B. Div. 291, per *Mellish, L. J.*

the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out."

Plaintiff Not In Pari Delicto.

If the party asking to be relieved from an illegal agreement was not in *pari delicto* with the other party, the court may relieve him. "Where the parties to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transgression, relief is given to him."⁶³ This exception applies where the party seeking relief was induced to enter into the agreement by fraud, undue influence, or duress,⁶⁴ or where the illegality is created by statute, and the party seeking relief is one of the class of persons whom the statute was intended to protect.⁶⁵

Separable Contract.

As a general rule governing all contracts, if any part of the consideration is illegal, the whole agreement is void.⁶⁶ This rule applies to sales, and, where such illegality exists, the seller cannot recover the price.⁶⁷ But if the contract is separable, so that it is clear that the parties intend it to be carried into effect piecemeal, the illegality of one part will not prevent the legal part from being enforced.⁶⁸ Thus, when each

⁶³ *Reynell v. Sprye*, 1 DeGex, M. & G. 660. See Clark, Cont. (2d Ed.) 340.

⁶⁴ *Smith v. Cuff*, 6 Maule. & S. 160, 165; *Atkinson v. Denby*, 6 Hurl. & N. 778, 7 Hurl. & N. 834; *Block v. McMurtry*, 56 Miss. 217, 31 Am. Rep. 357; *Davidson v. Carter*, 55 Iowa, 117, 7 N. W. 466; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 506; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

⁶⁵ *Browning v. Morris*, 2 Cowp. 790; *Bowditch v. Insurance Co.*, 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; *Mason v. McLeod*, 57 Kan. 106, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327; Clark, Cont. (2d Ed.) 341.

⁶⁶ *Waite v. Jones*, 1 Bing. N. C. 656; *Jones v. Waite*, 5 Bing. N. C. 341; *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Clark, Cont. (2d Ed.) 321.

⁶⁷ *Holt v. O'Brien*, 15 Gray (Mass.) 311; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Laing v. McCall*, 50 Vt. 657; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Ladd v. Dillingham*, 84 Me. 316.

⁶⁸ *Odessa Tramways Co. v. Mendel*, 8 Ch. Div. 235.

article is sold for a separate price, the price of those articles which it was lawful to sell may be recovered.⁶⁹ If, however, a note is given for the price of all the articles, there can be no recovery upon it, since the note is based in part upon an illegal consideration.⁷⁰ But if more than one note is given, and the legal items equal the amount of one of the notes, a recovery can be had upon it, because the plaintiff has the right to appropriate the other note to the illegal items.⁷¹

The rule that the illegality does not avoid the entire contract if it is divisible applies whether the illegality exists by statute or by common law,⁷² although it was formerly held that it did not apply where the illegality was created by statute, which it was said "is like a tyrant—where he comes, he makes all void."

CONFLICT OF LAWS.

69. The legality of a contract of sale is determined by the law in force where the sale is executed.

As a rule, the validity of a contract is to be determined by the law of the place where it is made; but, if it is to be performed in some other place, its validity is as a rule to be determined by the law of that place.⁷³ If a sale is valid where

⁶⁹ *Boyd v. Eaton*, 44 Me. 51, 69 Am. Dec. 83; *Carleton v. Woods*, 28 N. H. 290; *Walker v. Lovell*, Id. 133, 61 Am. Dec. 605; *Barrett v. Delano* (Me.) 14 Atl. 288; *Chase v. Burkholder*, 18 Pa. 48; *Clark, Cont.* (2d Ed.) 324. See, also, *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837.

⁷⁰ *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Coburn v. Odell*, 30 N. H. 540; *Kidder v. Blake*, 45 N. H. 530; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Cotten v. McKenzle*, 57 Miss. 418; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Braltch v. Guellick*, 37 Iowa, 212; *Oakes v. Merrifield*, 93 Me. 297, 45 Atl. 31; *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699. Cf. *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837. See, also, *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837.

⁷¹ *Crookshank v. Rose*, 5 Car. & P. 19; *Warren v. Chapman*, 105 Mass. 87. See, also, *Hynds v. Hays*, 25 Ind. 31.

⁷² *Pickering v. Railway Co.*, L. R. 3 C. P. 250; *U. S. v. Bradley*, 10 Pet. (U. S.) 343, 9 L. Ed. 448; *Rand v. Mather*, 11 Cush. (Mass.) 1, 7, 59 Am. Dec. 131; *Anson, Cont.* (4th Ed.) 189; *Clark, Cont.* (2d Ed.) 322.

⁷³ *Clark, Cont.* (2d Ed.) 342.

it is made, it will be enforced even in a state where it could not be lawfully made.⁷⁴ But, if the sale would be invalid in the state where it is attempted to be made—that is, where the property would pass—it will not be enforced there,⁷⁵ or in a jurisdiction where such a sale would be valid.⁷⁶ And the comity which induces a state to enforce a foreign contract does not extend to the enforcement of a contract entered into with the design of evading its laws. Accordingly, a sale of intoxicating liquors or other goods, executed with the mutual design of reselling in violation of the laws of another state, will not be enforced in the state whose laws are sought to be violated,⁷⁷ or even in the state where the sale is made.⁷⁸

The validity of a sale is determined by the law in force at the time of its execution, and a subsequent change in the law will not validate an invalid sale.⁷⁹

⁷⁴ *Greenwood v. Curtis*, 6 Mass. 858, 4 Am. Dec. 145; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Torrey v. Corliss*, 33 Me. 333; *Dame v. Flint*, 64 Vt. 533, 24 Atl. 1051; *Braunn v. Keally*, 146 Pa. 519, 23 Atl. 389, 23 Am. St. Rep. 811; *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286; *Lynch v. Scott*, 67 N. H. 589, 30 Atl. 420; *Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959; *Westheimer v. Welsman*, 60 Kan. 753, 57 Pac. 969.

⁷⁵ *Wasserboehr v. Boulter*, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344; *Glipps Brewing Co. v. De France*, 91 Iowa, 108, 58 N. W. 1067, 28 L. R. A. 386, 51 Am. St. Rep. 329; *Julius Winkelmeyer Brewing Ass'n v. Nipp*, 6 Kan. App. 730, 50 Pac. 956.

⁷⁶ *Theo. Hamm Brewing Co. v. Young*, 76 Minn. 246, 79 N. W. 111.

⁷⁷ *Waymell v. Reed*, 5 Term R. 599; *Webster v. Munger*, 8 Gray (Mass.) 584; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Davis v. Bronson*, 6 Iowa, 410. And see cases cited ante, p. 211, notes 13-15.

Mere knowledge of the buyer's intention to resell in violation of the laws of another state is not enough. *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Webber v. Donnelly*, 33 Mich. 469; *Samuel Bowman Distilling Co. v. Nutt*, 84 Kan. 724, 10 Pac. 163; ante, p. 211.

⁷⁸ *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; *Wasserboehr v. Morgan*, 168 Mass. 291, 47 N. E. 126. And see *Bollinger v. Wilson*, 76 Minn. 262, 266, 79 N. W. 109, 77 Am. St. Rep. 646; ante, p. 212.

⁷⁹ *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Bancher v. Mansel*, 47 Me. 58; *Bailey v. Mogg*, 4 Denio (N. Y.) 60; *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Clark*, Cont. (2d Ed.) 346.

CHAPTER VII.

CONDITIONS AND WARRANTIES.

- 70-72. In General.
- 73-75. Warranties.
- 76. Implied Warranty of Title.
- 77. Implied Warranty in Sale by Description.
- 78. Implied Warranties of Quality.
- 79. Implied Warranties in Sale by Sample.

IN GENERAL.

70. PERFORMANCE OF CONDITIONS. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.¹

71. CONDITIONS AND WARRANTIES. Broadly speaking, any promise by the seller with reference to the goods which are the subject of a contract of sale is termed a "warranty." In a narrower sense, the term "warranty" is confined to such a promise when it is collateral to the main purpose of the contract and is intended by the parties to be such that its breach shall give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. A promise with reference to the goods, if it is intended to be such that its performance by the seller shall be a condition of the obligation of the buyer to perform his promise to accept and pay for the goods, is often itself termed a "condition."

72. FULFILLMENT OF WARRANTY, WHEN A CONDITION. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as war-

¹ Sales Act, § 11 (1).

ranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to accept and pay for the goods.²

Performance of Conditions.

After a contract of sale has been entered into, it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract.³ A contract to sell or a sale may, however, be absolute or conditional.⁴ If the obligation of either party is subject to any condition, the condition must, of course, be performed, unless its performance be waived, before the other party can enforce such obligation; and if the contract contains any promise the performance of which is a condition precedent to the obligation of the other party, such promise must likewise be performed, unless its performance be waived. The subject of delivery, acceptance, and payment in performance of the contract, as well as of waiver and excuses for nonperformance, will be considered later.⁵

Dependent and Independent Promises.

The promises of the parties to a contract may be independent, or they may be dependent or conditional upon one another. If they are independent, failure by one of the parties to perform his promise does not discharge the contract; that is, does not give the other party a right to treat the contract as repudiated, but simply gives rise to a claim for damages.* On the other hand, if the promise of one party is dependent or conditional upon the promise of the other, the performance of the latter promise is either a condition precedent or a condition concurrent, as the case may be, to the obligation of the other party to perform. If it is a condition precedent, it must be performed before the obligation of the other party can arise; if it is a condition concurrent, it must be performed simultaneously with the promise of the other party, or, in point of fact, since simultaneous performance is impossible, except in contemplation of law, there must be concurrent willingness to perform the two promises.⁶ In either case the non-

² Sales Act, § 11 (2).

³ Post, p. 268.

⁴ See Sales Act, § 1 (3).

⁵ Post, p. 268 et seq., 305.

⁶ Clark, Cont. (2d Ed.) 450.

⁶ Clark, Cont. (2d Ed.) 458.

performance of the condition discharges the contract. In contracts of sale, as we shall see, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.⁷

The difficulty lies in discovering whether the parties regarded a particular term as essential to the contract. If they did, its performance is a condition precedent, and failure to perform it discharges the contract. If they did not, such failure can only give rise to an action for damages. The question whether a particular term in a contract is a dependent or an independent promise is a question of intention, and depends upon the construction of each individual contract. Various rules of construction for ascertaining the intention have been attempted; but the only rule that can safely be laid down is that the intention is to be ascertained from the language of the parties and the circumstances under which the contract is made.⁸ As was said by Blackburn, J.: "Parties may think some matter, apparently of very little importance, essential; and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of some importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."⁹

"Conditions" and Warranties.

A promise upon the performance of which the obligation of the other party is conditional may thus go to the entire consideration, as in the case of the promise of the seller to sell and deliver the goods which are the subject of the contract. The seller may, however, expressly or by implication, make some promise relating to the goods, and this promise

⁷ Post, p. 268.

⁸ *Graves v. Legg*, 9 Exch. 709, 23 Law J. Exch. 228; *Behn v. Burness*, 32 Law J. Q. B. 204, 205; *Watchman v. Crook*, 5 Gill. & J. (Md.) 239; *Maryland Fertilizing & Manuf'g Co. v. Lorentz*, 44 Md. 218; *Grant v. Johnson*, 5 N. Y. 247; *Knight v. Worsted Co.*, 2 Cush. (Mass.) 271, 287; *Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, per Shaw, C. J.

⁹ *Bettini v. Gye*, 1 Q. B. Div. 137.

may be dependent or independent, according to the intention of the parties; that is its performance may be a condition precedent to the obligation of the buyer to accept and pay for the goods, or it may not. The distinction between dependent and independent promises is fundamental, and the rules of law applicable to them are well established; but there is great confusion in the use of the terms by which these promises on the part of the seller are designated. Very generally promises of both kinds are called warranties; but often the term "condition" is applied to a promise of the first kind, and the term "warranty" is applied only to one of the second kind.¹⁰

The use of "condition," in the sense of promise, is unfortunate.¹¹ In one use of the term, "condition" means an uncertain event or contingency on the happening of which the obligation of the contract depends; there being no promise that the event or contingency shall happen. In such case the obligation of the contract does not attach until the condition is performed. Such conditions are sometimes called "contingent or casual conditions."¹² As has been pointed out, however, the word

¹⁰ Chalm. Sale of Goods Act (6th Ed.) 182; Clark, Cont. (2d Ed.) 211. Sir William Anson has collected six different senses in which "warranty" is used in the cases. Anson, Cont. (5th Ed.) 309.

¹¹ "The term 'condition,' as applied to contracts, appears to mean indifferently (a) an uncertain event on the happening of which the obligation of the contract is to depend, and (b) the stipulation in the contract making its obligation depend on the happening of such event." Chalm. Sale of Goods Act (6th Ed.) 178.

¹² "There is an important distinction between what may be called promissory conditions and contingent or casual conditions. In the latter case the obligations of both parties are suspended till the event takes place. In the former case the nonperformance of the condition by the promisor (unless excused by law) gives a right to the promisee to treat the contract as repudiated; that is to say, he is discharged from his part of the contract, and, further, he has a claim for damages. In the one case the obligations of the contract do not attach. In the other case the contract is broken. * * * In the older cases promissory conditions were referred to as 'dependent covenants or promises,' and were contrasted with independent covenants or promises, namely, stipulations the breach of which gives rise to a claim for damages, but not to a right to treat the contract as repudiated. Now the term 'dependent promise' appears to be merged in the wider term 'condition precedent.'" Chalm. Sale of Goods Act (6th Ed.) 179.

"condition" is often applied to a promise, if it is of such a nature that its performance is a condition precedent to the obligation of the other party to perform.¹³ For the sake of distinction, the term "promissory condition" is sometimes applied to such promises. Thus, in a contract to sell by description, it is obvious that the seller does not perform his contract if he does not tender goods conforming to the description; and, if a contract contains a promise which forms part of the terms of the description of the goods, the performance of this promise is a condition precedent to the obligation of the buyer to accept and pay for the goods. Such promises often arise by implication, as in the case of the seller's implied promise that he has a right to sell the goods,¹⁴ that the goods shall correspond with the description,¹⁵ that the goods shall be fit for the purpose for which they are required,¹⁶ that they shall be of merchantable quality,¹⁷ and that they shall correspond with the sample in quality.¹⁸ In the English Sale of Goods Act, these implied promises are called "conditions,"¹⁹ while in the proposed American Sales Act they are called "warranties."²⁰

A warranty is ordinarily said to be a promise with reference to the subject of the contract, but collateral to its main purpose.²¹ A warranty is defined by the English act as "an agreement with reference to the goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repu-

¹³ *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393. "Conditions are either statements or promises which form the basis of the contract. * * * When a term in the contract is ascertained to be a condition, then, whether it be a statement or a promise, the untruth or breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract." *Anson, Cont.* (6th Ed.) 146. See *Clark, Cont.* (2d Ed.) 464.

¹⁴ *Post*, p. 242.

¹⁷ *Post*, p. 252.

¹⁵ *Post*, p. 247.

¹⁸ *Post*, p. 262.

¹⁶ *Post*, p. 252.

¹⁹ Sections 11-15.

²⁰ Sections 12-16.

²¹ See *Chanter v. Hopkins*, 4 Mee. & W. 390, 404; *Dorr v. Fisher*, 1 Cush. (Mass.) 271.

diated.”²³ Where, as in this act, “warranty” is used in this narrow sense, it is therefore opposed to “condition,” when that word is used in the sense of promise; the distinction being that between independent covenants and promises and dependent covenants and promises.²⁴ Yet, although the buyer need not accept the goods if any “condition” be unfulfilled, it is held in England and in many states that he may waive performance of the condition, and that he may also treat the nonperformance of the condition as a breach of warranty.²⁵ Thus, the English act provides: “Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.”²⁶ In the proposed American Sales Act, on the other hand, the word “condition” is restricted to condition proper, and the word “warranty” is substituted for “condition,” where in the English act it is used in the sense of promise. The American act provides: “Where the property in the goods has not passed, the buyer may treat the fulfillment of the seller’s obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.”²⁷ It is pointed out by the draftsmen of the act that as a breach of warranty justifies rejection of the goods, and also an action for damages under this draft, the full meaning of the English act has been preserved.²⁷

On the whole, the use of the words “condition” and “warranty,” as they are used in the American act seems preferable, both because it avoids using “condition” with a double meaning, and because the fact that a promise is or is not in form collateral does not always determine whether it is a “condition” or “warranty,” as these words are used in the English act. When the buyer waives the performance of a “condition,” and elects

²³ Section 62 (1).

²⁴ Chalm. Sale of Goods Act (6th Ed.) p. 29.

²⁵ Post, p. 372.

²⁶ Sale of Goods Act, § 11 (1) (a).

²⁷ Section 11 (2).

²⁷ Note to section 14. See section 69. Cf. section 11 (1).

to treat the breach as a breach of "warranty,"²⁸ the promise, which has thus lost its character as a condition and become a warranty, is not in form collateral. And on a sale of specific goods by description, where the buyer asks for goods of a certain kind, the seller is held to warrant that the goods furnished are of the kind asked for, although his obligation to do so does not rest upon a collateral promise.²⁹ Again, in an executory contract, the buyer may, it seems, reject the goods if they are not of the kind or quality promised, although the promise was in form collateral.³⁰ "It is thus immaterial," says Prof. Williston,³¹ "whether the promise is collateral or not, and the distinction taken between conditions and warranties has probably caused more confusion than assistance. The essential thing under the English law is whether the contract is executed or executory. If it is executed, the buyer must seek redress in an action or counterclaim for damages, or in recoupment when sued for the price;³² if executory, the buyer may accept the goods, retaining his claim for damages,³³ or he may reject the goods."³⁴ Doubtless it is true that in the case of an executed sale the promise will generally be collateral in form, while in the case of an executory sale it will generally form part of the description of the goods. But neither of these propositions is invariably true. A. may agree to sell goods next week, warranted sound, and he may transfer title to-day to goods ordered by description."

In a few jurisdictions, however, the distinction between "conditions" and warranties is of importance, and it is held that, while a warranty survives acceptance, a condition that the goods shall be of a certain description does not, so far as concerns visible defects, when the buyer has had an opportunity for inspection.³⁵

Conditions Proper.

Attention has been called to the distinction between so-called promissory conditions, the nonfulfillment of which effects a dis-

²⁸ Ante, p. 231.

²⁹ Post, p. 368.

³⁰ Post, p. 251.

³¹ 16 Harv. Law Rev. 465, 467.

³² Post, p. 368. In some jurisdictions he may rescind for breach of warranty. Post, p. 368.

³³ Post, p. 372.

³⁴ Post, p. 365.

³⁵ Post, p. 373.

charge of the contract by breach, and conditions properly so called, sometimes called "contingent" or "casual" conditions, and sometimes "suspensive" or "suspensory" conditions;³⁶ that is to say, conditions the performance of which is a condition precedent to the obligation of the contract, but which neither party promises shall be fulfilled.³⁷ Such conditions suspend the operation of the promise until they are fulfilled, as where the promise of the buyer is conditional upon the act of a third person, or even upon his satisfaction with the goods.

Same—Sale Dependent on Act of Third Person.

Where the performance of a contract is dependent upon the act of a third person, the act must be performed before the rights dependent upon it can be enforced,³⁸ even though the third person unreasonably refuses to act. This rule applies to a contract for the sale of goods to be approved by a third person. Thus, where the seller sold his horse for 1 shilling cash, and a further payment of £200, provided the horse should trot 18 miles an hour within a month, "J. N. to be the judge of the performance," it was held no defense to the buyer's action for the delivery of the horse that J. N. refused to be present at the trial.³⁹ If the third person withholds his approval from motives of fraud or bad faith, it has been held that the approval may be dispensed with.⁴⁰ As a rule his decision is conclusive,⁴¹ but not if it is procured by fraud.⁴²

³⁶ Anson, Cont. (4th Ed.) 296, 297; Clark, Cont. (2d Ed.) 459.

³⁷ Ante, p. 229.

³⁸ U. S. v. Robeson, 9 Pet. (U. S.) 319, 327, 9 L. Ed. 142; Johnson v. Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Leadbetter v. Ins. Co., 13 Me. 265, 29 Am. Dec. 505; Smith v. Briggs, 3 Denio (N. Y.) 73; Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269; Clark, Cont. (2d Ed.) 460. Where price is to be fixed by a third person, ante, p. 60.

³⁹ Brogden v. Marriott, 2 Bing. N. C. 473. Cf. Deyo v. Hammond, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719.

⁴⁰ Baltimore & O. R. Co. v. Brydon, 65 Md. 611, 9 Atl. 126, 57 Am. Rep. 318.

⁴¹ Robbins v. Clark, 129 Mass. 145; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Thurman v. City of Omaha, 64 Neb. 490, 90 N. W. 253 (opinion of attorney on legality of bonds).

⁴² Shipway v. Broadwood (1899) 1 Q. B. 369.

Same—Sale of Goods to be Satisfactory.

Where it is a term of the contract that the goods shall be satisfactory to the buyer, his satisfaction is a condition precedent to his obligation to accept and pay for the goods. In such case it is immaterial that the goods are such that the buyer ought to have been satisfied with them; for, although the compensation of the seller may thus be dependent on the caprice of the buyer, who unreasonably refuses to accept the goods, yet the seller cannot be relieved from a contract into which he has voluntarily entered.⁴³ Of course, the parties may agree that the satisfaction is to be determined by the mind of a reasonable man, and not by the mere test or liking of the defendant.⁴⁴ In contracts in which the subject-matter involves the personal taste or judgment of the promisor,⁴⁵ for example, a suit of clothes⁴⁶ or a picture,⁴⁷ the courts construe the contract as making the promisor the sole judge. And the tendency of the courts is perhaps to construe all contracts of sale providing for the satisfaction of the promisor in the same way.⁴⁸ Where,

⁴³ *McCarren v. McNulty*, 7 Gray (Mass.) 139; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *Seeley v. Welles*, 120 Pa. 69, 13 Atl. 736; *Goodrich v. Van Nortwick*, 43 Ill. 445; *Warder, Bushnell & Glessner Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *D. M. Osborne & Co. v. Francis*, 38 W. Va. 312, 18 S. E. 591; *Housing v. Solomon*, 127 Mich. 654, 87 N. W. 57; *Garland v. Keeler* (N. D.) 108 N. W. 484.

⁴⁴ *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Lockwood Mfg. Co. v. Regulator Co.*, 183 Mass. 25, 66 N. E. 420.

⁴⁵ See cases cited note 43, *supra*.

⁴⁶ *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

⁴⁷ *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Pennington v. Howland*, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774.

⁴⁸ *Seeley v. Welles*, 120 Pa. 69, 13 Atl. 736; *Adams Radiator & Boiler Works v. Schnader*, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 893; *Silsby Mfg. Co. v. Town of Chico* (C. C.) 24 Fed. 893; *Campbell Printing Press Co. v. Thorp* (C. C.) 36 Fed. 414, 1 L. R. A. 645; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Exhaust Ventilator Co. v. Railroad Co.*, 66 Wis. 218, 28 N. W. 843, 57 Am. Rep. 257; *Williams Mfg. Co. v. Brass Co.*, 173 Mass. 356, 53 N. E. 862.

The courts frequently add the qualification that the promisor

however, the subject-matter involves such considerations as salability, operative fitness, and mechanical utility, there is more reason for construing the satisfaction contemplated as that of a reasonable man.⁴⁹ It seems that the question in such case should be the determination of the intention as evinced by the particular contract, and that no invariable rule of interpretation can be laid down.⁵⁰ The rules governing the time when the property passes, where goods are thus delivered to the buyer on trial, or on approval or on satisfaction, and the effect of retaining the goods without giving notice of dissatisfaction, have already been considered.⁵¹

Same—Goods “to Arrive.”

A not infrequent contract is one to sell goods “to arrive”; that is, to sell goods conditionally upon their arrival by a designated vessel. A contract to sell goods to arrive by a designated vessel does not import a promise on the part of the seller that the goods shall arrive, but the obligation of the contract is conditional upon the arrival of the goods in the vessel designated; that is, the contract is dependent upon a double condition precedent—that the vessel shall arrive and that the goods shall be on board upon her arrival.⁵² The condition may, of course,

must act in good faith. *Sillsby Mfg. Co. v. Town of Chico*, *supra*; *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; *In re George M. Hill Co.*, 123 Fed. 866, 59 C. C. A. 354.

⁴⁹ See *Wood Reaping & Mowing Mach. Co. v. Smith*, *supra*; *Schliess v. City of Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 337, 4 N. E. 749, 54 Am. Rep. 709; *Hummel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528, affirmed 164 N. Y. 603, 58 N. E. 1088; *Union League Club v. Machine Co.*, 204 Ill. 117, 68 N. E. 409; *Haney-Campbell Co. v. Association*, 119 Iowa, 188, 93 N. W. 297.

⁵⁰ *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781; *Electric Lighting Co. of Mobile v. Elder*, 115 Ala. 138, 21 South. 983; *McNeill v. Armstrong*, 81 Fed. 943, 27 C. C. A. 16; *City of Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321. See *Clark*, *Cont. (2d Ed.)* 432.

⁵¹ *Ante*, p. 144.

⁵² *Lovatt v. Hamilton*, 5 Mees. & W. 639; *Johnson v. McDonald*, 9 Mees. & W. 600; *Shields v. Pettie*, 4 N. Y. 122; *Neldon v. Smith*, 36 N. J. Law, 148.

be limited to the arrival of the goods, and not to their arrival in a particular vessel.⁵³ And the seller may warrant that the goods are on board, so that the contract to sell shall be conditional on the arrival of the vessel only.⁵⁴

WARRANTIES.

73. A contract of sale may be accompanied by one or more warranties, express or implied, given by the seller to the buyer.

74. A warranty may be either—

(a) Included in the contract of sale, or

(b) Given after the contract of sale is completed; but, in the latter case, it must be supported by a fresh consideration.

75. EXPRESS WARRANTIES. According to the weight of authority, any affirmation of fact or any promise by the seller relating to the goods in an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon; but in many jurisdictions it is necessary, also, that the seller shall have intended to warrant.⁵⁵

In General.

A warranty is not one of the necessary elements of a contract of sale. It is usually said to be a collateral engagement or promise; but, broadly speaking, any promise by the seller with reference to the goods which are the subject of the contract of sale is a warranty.⁵⁶ If the promise or warranty be such that its performance is a condition precedent to the obligation of the seller to perform on his part, it is often called a "condition," as distinguished from a "warranty."⁵⁷ A promise which forms part of the terms of the description of the goods is of this na-

⁵³ *Harrison v. Fortlage*, 161 U. S. 57, 18 Sup. Ct. 488, 40 L. Ed. 616; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276.

⁵⁴ *Hale v. Rawson*, 4 C. B. N. S. 85. Cf. *Dike v. Reitlinger*, 23 Hun (N. Y.) 242; *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329.

⁵⁵ See Sales Act, § 12.

⁵⁶ *Ante*, p. 226.

⁵⁷ *Ante*, p. 226.

ture. The distinction between these two kinds of promises must be borne in mind, but in these pages the term "warranty" is not confined to its narrower meaning.

A warranty may be express or implied. An implied warranty necessarily forms part of the contract. An express warranty, also, must form part of the contract, unless it be given after the contract is entered into and is supported by new consideration.⁵⁸ A subsequent warranty, not on a new consideration, is void.⁵⁹

Inasmuch as, by the rules of evidence, when once a contract has been reduced to writing, the entire contract is deemed to be expressed in the instrument, parol evidence is inadmissible to prove a warranty where none is contained in the instrument, or to vary the terms of a warranty therein expressed.⁶⁰ Of course this rule does not exclude such proof if the writing is not the contract, as where it is a mere receipt or bill of parcels.⁶¹ Nor does the fact that the contract has been reduced to writing necessarily exclude an implied warranty, if under the circumstances of the case such a warranty would otherwise

⁵⁸ *Congar v. Chamberlain*, 14 Wis. 258; *Porter v. Pool*, 62 Ga. 238.

⁵⁹ *Roscorla v. Thomas*, 8 Q. B. 234; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741; *Morehouse v. Comstock*, 42 Wis. 626; *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528; *Manasquam Gravel Co. v. P. Sandford Ross*, 73 N. J. Law, 506, 63 Atl. 1091. Cf. *Blaess v. Nichols & Shepard Co.*, 115 Iowa, 373, 88 N. W. 829.

⁶⁰ *Kain v. Old*, 2 Barn. & C. 627; *Randall v. Rhodes*, 1 Curt. (U. S.) 90, Fed. Cas. No. 11,556; *Frost v. Blanchard*, 97 Mass. 155; *Merrlam v. Field*, 24 Wis. 640; *Shepherd v. Gilroy*, 46 Iowa, 193; *Zimmerman Mfg. Co. v. Dolph*, 104 Mich. 281, 62 N. W. 339; *J. I. Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. 1013; *Vierling v. Furnace Co.*, 170 Ill. 189, 48 N. E. 1069; *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Buckstaff v. Russell*, 79 Fed. 611, 25 C. C. A. 129; *Rollins Engine Co. v. Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441; *McNaughton v. Wahl*, 99 Minn. 92, 108 N. W. 467; post, p. 265.

⁶¹ *Allen v. Pink*, 4 Mees. & W. 140; *Atwater v. Clancy*, 107 Mass. 369; *Filkins v. Whyland*, 24 N. Y. 338; *Irwin v. Thompson*, 27 Kan. 643; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *Nauman v. Ullman*, 102 Wis. 92, 78 N. W. 159 (conditional sale note); *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011.

arise.⁸² Neither does an express warranty necessarily exclude an implied warranty.⁸³

Intention to Warrant.

No form of words is necessary to create a warranty.⁸⁴ Nor, by weight of authority, is it necessary that the seller should have intended to warrant. Many decisions, indeed, do so require.⁸⁵ Thus it was said in a Pennsylvania case:⁸⁶ "Though to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty of itself nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied, from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it, for not to have exacted a direct engagement, had he desired to

⁸² *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282, 44 N. W. 548; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Id.*, 149 N. Y. 601, 44 N. E. 1121; *Cooper v. Payne*, 103 App. Div. 118, 93 N. Y. Supp. 69; *Elgin Jewelry Co. v. Estes & Dozier*, 122 Ga. 807, 50 S. E. 939; *Hooven & Allison Co. v. Wirtz* (N. D.) 107 N. W. 1078. Cf. *Lombard Water-Wheel Governor Co. v. Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180.

⁸³ *Post*, p. 265.

⁸⁴ *Chapman v. Murch*, 19 Johns. (N. Y.) 290, 10 Am. Dec. 227; *Shuman v. Heater* (Neb.) 106 N. W. 1042.

In early times the word "warrant" or its equivalent appears to have been necessary. *Chandelor v. Lopus*, Cro. Jac. 4; 2 Harv. Law Rev. 9.

⁸⁵ *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497; *Holmes v. Tyson*, 147 Pa. 305, 23 Atl. 504, 15 L. R. A. 209; *Mahaffey v. Ferguson*, 156 Pa. 156, 27 Atl. 21; *House v. Fort*, 4 Blackf. (Ind.) 294; *Enger v. Dawley*, 62 Vt. 164, 19 Atl. 478 (but see *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 698); *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. Rep. 731. See also, *Hopkins v. Tanqueray*, 15 C. B. 130 (cf. *Bannerman v. White*, 10 C. B. N. S. 844); *Pemberton v. Dean*, 88 Minn. 60, 92 N. W. 478, 60 L. R. A. 331, 97 Am. St. Rep. 503.

⁸⁶ *McFarland v. Newman*, *supra*.

buy on the vendor's judgment, must be counted an instance of folly." But other decisions hold with better reason that the question is, not whether the seller intended his affirmation as a warranty, but whether its natural tendency was to induce the buyer to purchase the goods, and whether he did purchase them in reliance upon it.⁶⁷ "If the representation as to character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not."⁶⁸ "He is responsible for the languages he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee."⁶⁹

Fact or Opinion.

A statement of opinion or a mere commendatory expression will not amount to a warranty.⁷⁰ Whether a statement is an affirmation of fact, or whether it is simply a statement of opinion

⁶⁷ *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 272, 16 Am. St. Rep. 753; *Stroud v. Pierce*, 6 Allen (Mass.) 413; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Kenner v. Harding*, 85 Ill. 264, 268, 28 Am. Rep. 615; *Ormsby v. Budd*, 72 Iowa, 80, 33 N. W. 457; *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. 917; *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903; *Herron v. Dibrell*, 87 Va. 289, 12 S. E. 674; *Erskine v. Swanson*, 45 Neb. 767, 64 N. W. 216; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414; *Northwestern Lumber Co. v. Calendar*, 36 Wash. 492, 79 Pac. 80; *Harrigan v. Thresher Co.*, 81 S. W. 261, 26 Ky. Law Rep. 317.

The affirmation must be made in such manner and under such circumstances as to justify the buyer in believing that a warranty was intended. *Zimmerman v. Morrow*, 28 Minn. 367, 10 N. W. 139; *Torkelson v. Jorgenson*, 28 Minn. 383, 10 N. W. 416.

A warranty, if operative in inducing the sale, need not be the sole inducement. *Mitchell v. Pinckney*, 127 Iowa, 696, 104 N. W. 286.

⁶⁸ *Ingraham v. Railroad Co.*, 19 R. I. 356, 33 Atl. 875.

⁶⁹ *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595.

⁷⁰ *Power v. Barham*, 4 Adol. & E. 473; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 88, 43 Am. Dec. 367; *Warren v. Coal Co.*, 83 Pa. 437, 440; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Robinson v. Harvey*, 82 Ill. 58; *Austin v. Nickerson*, 21 Wis. 542, 543; *Mason v. Chappell*, 15 Grat. (Va.) 572, 583; *James v. Bocage*, 45 Ark. 234; *Ragsdale v. Shipp*, 108 Ga. 817, 34 S. E. 167; *Quis v. Halloran*, 74 App. Div.

or a commendatory expression, often depends on the nature of the sale and the circumstances of the case. "In determining whether there was in fact a warranty," said the court in a leading case, "the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not."⁷¹ If the language is not unmistakable, the question is for the jury;⁷² though, if the warranty is contained in a written contract, the construction of the warranty is for the court.⁷³ Of course, the question whether the language is unmistakable will be decided differently by different courts. Thus in a case where two pictures were sold at auction by a catalogue, in which one was said to be by Claude Lorraine, and the other by Teniers, Lord Kenyon held this no warranty that the pictures were genuine works of those masters, but merely an expression of opinion.⁷⁴ But where the seller sold, by a bill of parcels, "four pictures,

621, 77 N. Y. Supp. 196; *Shiretzki v. Julius Kessler & Co.* (Ala.) 37 South. 422.

In the absence of fraud, a statement of quality, accompanied by refusal to warrant, is to be deemed an expression of opinion. *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5.

Where the seller said that a mare was sound to the best of his knowledge, refusing to warrant, and he knew the mare to be unsound, it was held that there was a qualified warranty that she was sound to the best of his knowledge. *Wood v. Smith*, 5 Man. & R. 124.

⁷¹ *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615. See, also, *Pasley v. Freeman*, 3 Term R. 57; *Roberts v. Applegate*, 153 Ill. 210, 38 N. E. 676 (cf. *Eyers v. Haddem* [C. C.] 70 Fed. 648).

⁷² *Stucley v. Bally*, 1 Hurl. & C. 405, 417, 31 Law J. Exch. 483; *Power v. Barham*, 4 Adol. & E. 473; *Edwards v. Marcy*, 2 Allen, (Mass.) 486, 490; *Tuttle v. Brown*, 4 Gray (Mass.) 457, 64 Am. Dec. 80; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Kingsley v. Johnson*, 49 Conn. 462; *Crenshaw v. Slye*, 52 Md. 140; *Claghorn v. Lingo*, 62 Ala. 230; *Thorne v. McVeagh*, 75 Ill. 81; *McDonald Mfg. Co. v. Thomas*, 53 Iowa, 558, 5 N. W. 737; *Erskine v. Swanson*, 45 Neb. 767, 64 N. W. 216; *Sauerman v. Simmons*, 74 Ark. 563, 86 S. W. 429.

⁷³ *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Rice v. Codman*, 1 Allen (Mass.) 377, 380.

⁷⁴ *Jendwine v. Slade* (1797) 2 Esp. 572.

views in Venice, Canaletti," it was left to the jury to say whether the seller meant to warrant them as genuine works of Canaletti, and Lord Denman distinguished the case from the preceding one by the suggestion that Canaletti was a comparatively modern painter of whose works it would be possible to make proof as a matter of fact, but that in the case of very old masters the assertion was necessarily matter of opinion.⁷⁵ It would be beyond the scope of this book to consider in detail particular expressions which have been held to be warranties.

Known Defects.

As a rule a general warranty is held not to extend to known defects or to defects apparent on a simple inspection.⁷⁶ This rule rests on the presumed intention of the parties, who cannot be supposed the one to assert, and the other to rely on, the truth of what they know to be untrue. But the warranty may be so expressed as to protect the buyer against the consequences of patent defects, and an intention to include them will readily be inferred in doubtful cases, where the buyer may naturally prefer to rely on the warranty rather than on his own judgment.⁷⁷

⁷⁵ *Power v. Barham* (1836) 4 Adol. & E. 473. Canaletti died in 1768, Claude Lorraine in 1682, and Teniers (the younger) in 1694. And see *Lomi v. Tucker*, 4 Car. & P. 15.

⁷⁶ *Butterfield v. Burroughs*, 1 Salk. 211; *Margetson v. Wright*, 7 Bing. 603, 8 Bing. 454; *Schuyler v. Russ*, 2 Caines (N. Y.) 202; *Bennett v. Buchan*, 76 N. Y. 386; *Hill v. North*, 34 Vt. 604; *Leavitt v. Fletcher*, 60 N. H. 182; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675; *Ragsdale v. Shipp*, 108 Ga. 817, 34 S. E. 167. The rule does not apply if the seller artificially conceals the objects from the buyer. *Chadsey v. Greene*, 24 Conn. 562; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Scott v. Manufacturing Co.*, 70 Kan. 498, 78 Pac. 823; *Id.*, 70 Kan. 500, 80 Pac. 955; *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602.

⁷⁷ *Hill v. North*, 34 Vt. 604; *Brown v. Bigelow*, 10 Allen (Mass.) 242; *Shewalter v. Ford*, 34 Miss. 417; *Marshall v. Drawhorn*, 27 Ga. 275, 279; *McCormick v. Kelly*, 28 Minn. 135, 138, 9 N. W. 675; *Branson v. Turner*, 77 Mo. 489; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143; *Hansen v. Gaar, Scott & Co.*, 63 Minn. 94, 65 N. W. 254.

Future Events.

Blackstone says that "the warranty can only reach to things in being at the time the warranty was made, and not to things in futuro; as that a horse is sound at the buying of him, not that he will be sound two years hence."⁷⁸ But the law is now different, and the seller may undertake to indemnify the buyer against defects which may arise in the future or future events.⁷⁹ Thus warranties in respect to machines as to their sufficiency to do the required work are frequent.⁸⁰ At the same time a warranty in respect to the soundness, condition, or quality of the goods will usually be construed as applying to their soundness, condition, or quality at the time of the sale, and not at some future time.⁸¹

IMPLIED WARRANTY OF TITLE.

76. In a contract to sell or a sale, unless a contrary intention appears, there is an implied warranty (sometimes called a condition) on the part of the seller that in the case of a sale he has title to the goods, and that in the case of a contract to sell he will have title to the goods at the time when the property is to pass; but in some states, in the case of a sale, the warranty is confined to cases in which the seller is in possession of the goods.

There has never been any question that in an executory contract the seller warrants by implication the title to the goods which he promises to sell; or that in the sale of a specific chattel an affirmation by the seller that the chattel is his is equiva-

⁷⁸ 3 Bl. Comm. 166.

⁷⁹ *Eden v. Parkison*, 2 Doug. (Mich.) 735; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654, 20 L. Ed. 689; *Snow v. Manufacturing Co.*, 69 Ala. 111, 44 Am. Rep. 509.

⁸⁰ *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. 343; *Hansen v. Gaar*, *Scott & Co.*, 63 Minn. 94, 65 N. W. 254; *J. I. Case Threshing-Machine Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646.

⁸¹ *Lord v. Edwards*, 148 Mass. 476, 20 N. E. 161, 2 L. R. A. 519, 12 Am. St. Rep. 581; *Luthy v. Waterbury*, 140 Ill. 684, 30 N. E. 351; *Drews v. Ann River Logging Co.*, 53 Minn. 199, 54 N. W. 1110; *English v. Commission Co.*, 57 Fed. 451, 6 C. C. A. 416; post, p. 261.

lent to a warranty of title; or that such an affirmation, with the consequent warranty, may be implied from the conduct of the seller as well as from his words, and may also result from the nature and circumstances of the sale.⁸² But it was formerly held that there was no warranty of title implied in the mere act of sale.⁸³ This view was strongly supported in the opinion in *Morley v. Attenborough*⁸⁴ of Parke, B., who, however, recognized so many exceptions to the rule, founded upon declarations or conduct equivalent to warranty, that, as Lord Campbell said,⁸⁵ the exceptions "well might eat up the rule." The old rule was substantially altered in 1864 by *Eichholz v. Bannister*,⁸⁶ upon the strength of the opinion of the judges in which case, Benjamin, after reviewing the authorities, argues conclusively that the exceptions have become the rule, and that the old rule has dwindled into the exceptions. He states the rule as follows: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."⁸⁷

Rule in America.

In the United States a distinction between goods in possession of the seller and goods not in possession has been somewhat upheld; and the rule has been said to be that as to goods in possession there is an implied warranty, but that when the goods are in the possession of a third person there is no warranty.⁸⁸ That there is an implied warranty of title when the

⁸² *Morley v. Attenborough*, 3 Exch. 500, per Parke, B.

⁸³ *Noy, Max. v. 42*; Co. Litt. 102a.

Cf. *L'Apostre v. L'Plastrier*, cited 1 P. Wms. 318, 1 Ves. Sr. 352, *Burdick, Cas. Sales*, 678.

⁸⁴ 3 Exch. 500.

⁸⁵ *Sims v. Marryat*, 17 Q. B. 281, 291, 20 Law J. Q. B. 454.

⁸⁶ 17 C. B. (N. S.) 708, 34 Law J. C. P. 105. See, also, *Edwards v. Pearson*, 6 Times Law R. 220, *Burdick's Cas. Sales*, 679.

⁸⁷ *Benj. Sales*, § 639. This rule was approved and followed by *Stephen, J.*, in *Raphael v. Burt*, 1 Cab. & El. 325.

⁸⁸ 2 Kent. Comm. 478. This distinction was upheld by Lord Holt in *Medina v. Stoughton*, 1 Salk. 210, *Ld. Raym.* 593, but repudiated by *Buller, J.*, in *Pasley v. Freeman*, 3 Term R. 51, and by the judges

seller is in possession of the goods is universally held,⁸⁹ the implication resting on the theory that possession is equivalent to an affirmation of title.⁹⁰ But, though the other branch of the rule has been frequently approved and sometimes applied,⁹¹ the tendency of the later decisions is against the recognition of such a distinction, and favorable to the modern English rule.⁹² Thus, in a Massachusetts case,⁹³ Dewey, J., said: "Possession here must be taken in its broadest sense, and the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive." And, in a later case⁹⁴ in the same court, Morton, J., observed: "If the vendor has either actual or constructive possession, and sells the chattels, and not merely his interest in them, such sale is equivalent to an affirmation of title,"—a distinction which, as Mr. Corbin observes,⁹⁵ differs little from that established in *Eichholz v. Bannister*.

No Warranty in Official Sales.

The circumstances of the sale or the agreement may, of course, indicate that the seller is transferring merely such in-

in *Morley v. Attenborough*, 3 Exch. 500, and in *Eichholz v. Bannister*, 17 C. B. (N. S.) 708.

⁸⁹ *Shattuck v. Green*, 104 Mass. 42; *Maxfield v. Jones*, 76 Me. 135, 137; *Starr v. Anderson*, 19 Conn. 338; *Sargent v. Currier*, 49 N. H. 311, 6 Am. Rep. 524; *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944; *Gould v. Bourgeois*, 51 N. J. Law, 361, 18 Atl. 64; *Rice v. Forsyth*, 41 Md. 389; *Williamson v. Sammons*, 34 Ala. 691; *Morris v. Thompson*, 85 Ill. 16; *Marshall v. Duke*, 51 Ind. 62; *Hunt v. Sackett*, 31 Mich. 18; *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748, and 28 N. W. 406; *Davis v. Smith*, 7 Minn. 414 (Gil. 328); *Gross v. Klerski*, 41 Cal. 111; *Croly v. Pollard*, 71 Mich. 612, 39 N. W. 853; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321.

⁹⁰ *Shattuck v. Green*, 104 Mass. 42, per Morton, J.

⁹¹ *Huntingdon v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430; *Long v. Hickingbottom*, 28 Miss. 773, 64 Am. Dec. 118.

⁹² *Gould v. Bourgeois*, 51 N. J. Law, 361, 373, 18 Atl. 64, per Depue, J.; 1 Smith, Lead. Cas. (Edson's Ed.) 344; *Cogar v. Lumber Co.*, 46 W. Va. 256, 33 S. E. 219. The cases are collected in *Willist. Cas. Sales*, 692.

⁹³ *Whitney v. Heywood*, 6 Cush. (Mass.) 82, 86.

⁹⁴ *Shattuck v. Green*, 104 Mass. 42, 45.

⁹⁵ *Benj. Sales* (Corbin's Ed.) § 962, note 21.

terest as he may have, and negative the implication of a warranty.⁹⁶ Sales by a judicial officer, sheriff, executor or administrator, mortgagee, or auctioneer fall within the exception, the circumstances in such sales being such as to indicate that the seller sells only such interest as he may have in the goods.⁹⁷

Nature of Warranty—Remedies of Buyer—Damages.

The implied understanding of the seller that he has, or will have, title to or a right to sell the goods, is usually called a "warranty." The performance of the warranty, however, is clearly a condition precedent to the buyer's obligation to accept, and, if the seller tenders goods to which he has not title, the buyer may reject them.⁹⁸ And if, after delivery of the goods, it turns out that the seller had not title, and the buyer has been compelled to surrender the goods to a superior title, he may recover the price, if paid, as on a failure of consideration.⁹⁹ In some jurisdictions he may also elect to recover unliquidated damages for the breach of warranty,¹⁰⁰ in which case, upon principle, the measure of damages is the actual loss; that is, the difference between the value of the goods and their value had the title been as warranted.¹⁰¹ In other jurisdictions,

⁹⁶ *Gould v. Bourgeois*, 51 N. J. Law, 361, 18 Atl. 64; *Porter v. Bright*, 82 Pa. 441.

⁹⁷ *Chapman v. Speller*, 14 Q. B. 621, 19 Law J. Q. B. 241; *The Monte Allegre*, 9 Wheat. (U. S.) 616, 6 L. Ed. 174; *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176; *Baker v. Arnot*, 67 N. Y. 448; *Corwin v. Benham*, 2 Ohio St. 36; *Bingham v. Maxcy*, 15 Ill. 296; *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944; *Johnson v. Laybourn*, 56 Minn. 332, 57 N. W. 935. See Sales Act, § 13 (4).

⁹⁸ *Nevels v. Lumber Co.*, 108 Ky. 550, 56 S. W. 969. Such is the effect of Sale of Goods Act, § 12 (1), calling the undertaking a "condition."

Sales Act, § 13 (1), calls it a "warranty"; but the buyer may treat the fulfillment of the obligation to furnish goods as described and as warranted as a condition of his obligation to accept. Section 11.

⁹⁹ *Elchholz v. Bannister*, 17 C. B. N. S. 708; *Wilkinson v. Ferree*, 24 Pa. 190.

¹⁰⁰ This was suggested by Benjamin, although there appears to be no English decision in point. *Benj. Sales*, § 639. The Sale of Goods Act so provides. See sections 11 (1) (a), 53 (1). See, also, Sales Act, §§ 13 (1), 69 (1) (b).

¹⁰¹ *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783; *Grose v. Hennessey*, 13 Allen (Mass.) 889; *Close v. Cross-*

however, following the rule of damages for breach of covenant of title to real property, the measure of damages is held to be the consideration paid, with interest.¹⁰²

In warranting the title to the goods, the seller warrants that they are free from incumbrances.¹⁰³

When Action for Breach Accrues.

Whether an action for breach of warranty of title will lie upon mere proof that a superior title or an incumbrance exists, or whether proof of eviction or of interference with possession is necessary, is a question on which the decisions conflict. Those which maintain the first alternative adopt the analogy of covenants of right to convey or against incumbrances,¹⁰⁴ while

land, 47 Minn. 500, 50 N. W. 694; *Hendrickson v. Back*, 74 Minn. 90, 78 N. W. 1019.

"Where no special damages are set forth, the measure of the loss is the value of the property purchased; and, where there is no evidence of value but the consideration paid, that will be taken as the standard of value. Where there is failure of title in part, or an inferior title is sold, the loss is the difference between the property as conveyed and its value had the title been as warranted." *Hoffman v. Chamberlain*, *supra*.

¹⁰² See *Crittenden v. Posey*, 1 Head. (Tenn.) 311; *Noel v. Wheatly*, 30 Miss. 181; *Goss v. Dysant*, 31 Tex. 186; *Arthur v. Moss*, 1 Or. 193.

¹⁰³ *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hall v. Altkin*, 25 Neb. 360, 41 N. W. 192; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; *Mason v. Bohannon*, 79 Ark. 435, 96 S. W. 181. It seems that there is no English decision in point. *Chalm. Sale of Goods Act* (6th Ed.) 31.

Sale of Goods Act, § 12 (3), so provides, and this is followed by *Sales Act*, § 13 (3). *Sale of Goods Act*, § 12 (2), also provides that there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. This is followed by *Sales Act*, § 13 (2), which adds the words "as against any lawful claims existing at the time of the sale." For a discussion of the effect of these two subsections, see *Benj. Sales* (5th Eng. Ed.) 672-674, where the editors submit "that no warranty in a sale of goods against incumbrances or for quiet possession was part of the common law."

¹⁰⁴ *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Perkins v. Whelan*, 116 Mass. 542; *Payne v. Rodden*, 4 Bibb (Ky.) 304, 7 Am. Dec. 739; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; *Matheny v. Mason*, 78 Mo. 677, 39 Am. Rep. 541; *Word v. Gavin*, 1 Head (Tenn.) 506.

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those which maintain the other alternative adopt the analogy of covenants for quiet possession.¹⁰⁵

IMPLIED WARRANTY IN SALE BY DESCRIPTION.

77. Where there is a contract to sell or a sale of goods by description, there is an implied warranty (sometimes called an implied "condition") that the goods shall correspond with the description; and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not correspond with the description.¹⁰⁶

Rule in England.

When there is a contract to sell goods by description, the fulfillment by the seller of his obligation to furnish goods as described is a condition precedent to the obligation of the seller to perform his promise to accept and pay for the goods. If the seller fails to tender goods answering the description, he fails to perform, not a collateral agreement or "warranty," if the term is used in the narrow sense, but the contract itself. This was pointed out in *Chanter v. Hopkins*¹⁰⁷ by Lord Abinger, who observed: "A good deal of confusion has arisen in many of the cases on this subject from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract, and, though part of the contract, yet collateral to the express object

¹⁰⁵ *Wanser v. Messler*, 29 N. J. Law, 256; *Krumbhaar v. Birch*, 83 Pa. 426; *Linton v. Porter*, 61 Ill. 107; *Gross v. Klerski*, 41 Cal. 111; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *O'Brien v. Jones*, 91 N. Y. 196; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100; *Barnum v. Cochran*, 143 Cal. 642, 77 Pac. 656.

In an action for the price, it is no defense that the title was in a third person at the time of the sale, while the defendant holds possession. *Johnson v. Oehmig*, 95 Ala. 189, 10 South. 430, 36 Am. St. Rep. 204. See, also, *The Electron*, 79 Fed. 689, 21 C. C. A. 12.

¹⁰⁶ See Sales Act, § 14. Cf. Sale of Goods Act, § 13.

¹⁰⁷ 4 Mees. & W. 899.

of it. But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a 'warranty,' and the breach of such contract a 'breach of warranty'; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill: as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas. The contract is to sell peas, and, if he sends him anything else in their stead, it is a nonperformance of it." But, whatever the confusion in terms, the law is clear: If the sale is of a described article, the tender of an article answering the description is a condition precedent to the buyer's liability, and, if the condition is not performed, the buyer is entitled to reject the article, and, if he has paid for it, to recover the price as money had and received for his use.¹⁰⁸ And, although the sale is by sample, it is not sufficient that the bulk corresponds with the sample if it does not also correspond with the description.¹⁰⁹ For example, where the sale was of "foreign refined rape oil, warranted only equal to sample," and the oil corresponded with the sample, but the jury found that it was not "foreign refined rape oil," it was held that the buyer was not bound to receive it.¹¹⁰

The cases of sale by description are usually cases of contracts to sell unascertained goods by description; that is, goods of a certain kind or class. And, indeed, there can be no contract to sell unascertained goods, except by description. There may, however, be a contract to sell specific goods by description; for, although in such case the goods are identified, it may be an essential term of the contract, either express or implied, that

¹⁰⁸ *Josling v. Kingsford*, 32 Law J. C. P. 94; *Mody v. Gregson*, L. R. 4 Exch., at page 53; *Borrowman v. Drayton*, 2 Exch. Div. 15; *Wleier v. Schillizzi*, 17 C. B. 619; *Benj. Sales*, § 600.

"If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it." *Bowes v. Shand*, 2 App. Cas. 455, per Lord Blackburn.

¹⁰⁹ *Nichol v. Godts*, 10 Exch. 191, 23 Law J. Exch. 314; *Azamar v. Casella*, L. R. 2 C. P. 677.

¹¹⁰ *Nichol v. Godts*, 10 Exch. 191, 23 Law J. Exch. 314.

the goods shall be goods of a certain description.¹¹¹ Thus, where there was a contract to sell turnip seed as "Skirving's Swedes," it was held that it was a sale by description of the article, and that the contract was not satisfied by tender of any other seed than "Skirving's Swedes."¹¹² And in a recent case,¹¹³ where the plaintiff contracted to sell to the defendant a reaping machine, which the seller said was in his possession in another town, and which he said had been new the previous year, and had only been used to cut 50 or 60 acres, but the statements about the machine were untrue, and the defendant rejected it, it was held that the statements about the machine were not a mere collateral warranty, but an identification of the machine, and that the sale was by description, and the defendant was justified in rejecting it. Channell, J., said: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies to a case like the present, where the buyer has never seen the article, but has bought by description. In that case, by Sale of Goods Act 1893, § 13, there is an implied condition that the goods shall correspond with the description, which is a different thing from a warranty. The most usual application of that section, no doubt, is to the case of unascertained goods; but I think it must also be applied to cases such as this, where there is no identification otherwise than by description."

¹¹¹ See *Kennedy v. Mall Co.*, L. R. 2 Q. B. 580, 587.

¹¹² *Allan v. Lake*, 18 Q. B. 560.

¹¹³ *Varley v. Whipp* (1900) 1 Q. B. 513. Channell, J., observes that "the case turns on a fine point, namely, whether the words used * * * were part of the description, or merely amounted to a collateral warranty." He illustrates: "If a man says he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year old horse in the last stall, and there is a horse in the stall, but he is not a four-year old, the property would not pass. But if he says he will sell a four-year old horse, and there is a four-year old horse in the stall, and he says that the horse is sound, this last statement would only be a collateral warranty." See comments on this case in 16 *Harv. Law Rev.* 465; *Benj. Sales* (5th Eng. Ed.) 611 et seq. Under the proposed American Sales Act, §§ 11, 14, the necessity of drawing such fine distinctions would not arise.

Rule in United States.

In the United States the cases generally declare that words of description imply a warranty that the goods shall conform to the description.¹¹⁴ "There is no doubt," says Shaw, C. J., "that, in a case of sale, words of description are held to constitute a warranty that the articles sold are of the species and quality so described."¹¹⁵ Thus, where the article sold was described in the bill of parcels as "blue paint," it was held that this amounted to a warranty that the article should be blue paint, and not a different article.¹¹⁶

It seems, however, that the rule of law differs little, if at all, from that prevailing in England; for, although there is, as we shall see, in considering the buyer's remedies, some disagreement as to his remedy for breach of warranty in certain cases,¹¹⁷ all the authorities agree that he may decline to accept the goods if they fail to conform to the description.¹¹⁸ The law

¹¹⁴ *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Lewis v. Rountree*, 78 N. C. 323; *Whitaker v. McCormick*, 6 Mo. App. 114; *Flint v. Lyon*, 4 Cal. 17; *Morse v. Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563; *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581, 52 N. E. 1083; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916; *Timken Carriage Co. v. C. S. Smith & Co.*, 123 Iowa, 554, 99 N. W. 183.

¹¹⁵ *Hogins v. Plympton*, 11 Pick. (Mass.) 97, 99; *Winsor v. Lombard*, 18 Pick. (Mass.) 57, 60.

¹¹⁶ *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

¹¹⁷ Post, p. 368.

¹¹⁸ *Pope v. Allis*, 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393. See, also, *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366, per Gray, J.; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Avery v. Miller*, 118 Mass. 500; *Dalley v. Green*, 15 Pa. 118; *Woodle v. Whitney*, 23 Wis. 56, 99 Am. Dec. 102; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438 (pointing out that if the buyer has accepted part performance the buyer may treat the breach of condition as a breach of warranty); *Haase v. Nonnemacher*, 21 Minn. 486, 490, per Gilfillan, C. J.; *Jones v. George*, 61 Tex. 345, 349, 48 Am. Rep. 280; *Bagley v. Rolling Mill Co. (C. C.)* 21 Fed.

is clearly stated in *Pope v. Allis*,¹¹⁹ a recent case in the Supreme Court of the United States. The point decided was that the buyer could recover the price of iron paid for before delivery, and rejected after inspection, for failure to conform to the grade required by the contract. Woods, J., said: "When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an understanding that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition; the performance of which is precedent to any obligation upon the vendee under the contract."

So also, where specific goods are sold by description, when the goods are not open to inspection or their failure to comply with the description is not discoverable by inspection, a warranty is implied that the goods are of the kind described, as where the buyer asks for goods of a particular kind, and the seller furnishes goods purporting to answer the description.¹²⁰ In such case, if the goods fail to conform to the description, the buyer may reject them.¹²¹

159, 162; *Morse v. Moore*, 83 Me. 473, 479, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Columbian Iron Works & Dry Dock Co. v. Douglas*, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362; *Puritan Mfg. Co. v. Westermire*, 47 Or. 537, 84 Pac. 797. See, also, *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712.

¹¹⁹ 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393.

¹²⁰ *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438 (strap-leaf red-top turnip seed); *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (large Bristol cabbage seed); *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280 (Paris green, not chrome green); *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916 ("rape seed," not wild mustard seed).

In *Chandelor v. Lopus*, Cro. Jac. 4, where a goldsmith sold a stone which he affirmed to be a bezoar stone, it was held that "the bare affirmation that it was a bezoar stone, without warranting it, is no cause of action." This was followed in *New York in Seixas v. Wood*, 2 Calnes, 48, 2 Am. Dec. 215, and *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266; but these cases on that point have been practically overruled. *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *White v. Miller*, supra.

¹²¹ *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595 (barrels of what was sold as "blue vitriol," containing 25 per cent. of blue vitriol, and 75 of green vitriol); *Fogg's Adm'r v. Rodgers*, 84 Ky. 558, 2 S. W. 248 (stacks, sold as "hemp," composed largely of weeds).

The proposed Sales Act provides: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description."¹²² As a breach of the warranty, under the act, justifies rejection of the goods, and also an action for damages, the effect is the same as under the English act, where the term "condition" is used.¹²³

IMPLIED WARRANTIES OF QUALITY.

78. Subject to the exceptions hereinafter mentioned, there is at common law no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale.

EXCEPTIONS—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the grower or manufacturer or not), there is an implied warranty, sometimes called a "condition," that the goods shall be reasonably fit for such purpose.¹²⁴

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), and the buyer has no opportunity to examine them, there is an implied warranty, sometimes called a "condition," that the goods shall be of merchantable quality.¹²⁵

(3) On a sale of provisions, it is held in some states that there is an implied warranty that they are fit for consumption; but in most states the rule is confined to sales by dealers for immediate consumption by the buyer.

¹²² Section 14. This section, following the English Act (section 13), also provides: "And if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description."

¹²³ Ante, p. 231.

¹²⁴ See Sales Act, § 15 (1). As to the effect of the words in parenthesis, post, p. 258.

¹²⁵ See Sales Act, § 15 (2).

Caveat Emptor.

The maxim of the common law, "caveat emptor," is the general rule, so far as quality is concerned, applicable to sales. The buyer, in the absence of fraud, purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale.¹²⁶ The rule of caveat emptor probably had its origin in the fact that in early times nearly all sales of goods took place in market overt.¹²⁷ The tendency of modern cases is to diminish its scope by implying warranties in certain cases, where the circumstances indicate that such was the intention of the parties.

Whether Warranty may be Implied from Usage.

Benjamin says that an implied warranty may result from usage,¹²⁸ but this statement is somewhat misleading. He cites *Jones v. Bowden*,¹²⁹ an action of deceit, in which it appeared that in auction sales of certain drugs, as pimento, it was usual to state in the broker's catalogue whether they were sea damaged; and upon the evidence of the usage, and of the absence in the sale in question of a statement that they were sea damaged, it was held that the buyer could maintain an action for fraud. As the writer elsewhere observes,¹³⁰ the grounds are not very intelligently given, but it may be fairly inferred from the language of Mansfield, C. J., that he considered the verdict as establishing a usage which imposed on the seller the duty of disclosing the defect; thus bringing the case within the principle that the suppression of that which is true, and which it is the duty of the seller to make known, constitutes fraud.

As observed by Davis, J., in the leading case of *Barnard v. Kellogg*,¹³¹ in the Supreme Court of the United States, the

¹²⁶ *Miller v. Tiffany*, 1 Wall. (U. S.) 298, 17 L. Ed. 540; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. Ed. 987; *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Hargous v. Stone*, 5 N. Y. 73; *Moore v. McKinnlay*, 5 Cal. 471; *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39. See, also, cases cited post, note 140.

¹²⁷ *Morley v. Attenborough*, 3 Exch., at page 511, per Parke, B.

¹²⁸ Benj. Sales, § 655.

¹²⁹ 4 Taunt. 847. Cf. *Syers v. Jonas*, 2 Exch. 111.

¹³⁰ Benj. Sales, § 480.

¹³¹ 10 Wall. (U. S.) 383, 19 L. Ed. 987.

proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence; but it does not go beyond this, and is used on the theory that the parties knew of its existence, and contracted with reference to it. But evidence of a usage to imply a warranty where none is implied by the common law,¹³² or evidence of a usage against a warranty where a warranty is implied by law,¹³³ is inadmissible. Custom cannot be admitted to control the general rules of the law. Thus in *Barnard v. Kellogg*,¹³⁴ where the buyer purchased in Boston certain wool, after having examined four bales and declined to examine the rest, and it turned out that some of the bales, unknown to the seller, were falsely packed, it was held that the seller was not bound by warranty against false packing, which by the custom of dealers in wool in New York and Boston was implied from the fact of sale. Davis, J., said: "The usage was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sale of personal property." In concluding, he remarked that it was proper to add that the parties did not know of the custom, and could not, therefore, have dealt with reference to it. Whether the result would have been different if the custom had been known to the parties the opinion does not intimate; but it seems that something more than mere knowledge of the custom would be necessary to show that they intended to make it a term of the contract.

The proposed Sales Act,¹³⁵ following the English Sale of Goods Act,¹³⁶ provides: "An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by usage of trade."

¹³² *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726; *Snelling v. Hall*, 107 Mass. 134. See, also, *Coxe v. Helsley*, 19 Pa. 243; *Wetherill v. Nellson*, 20 Pa. 448, 54 Am. Dec. 741.

¹³³ *Whitmore v. Iron Co.*, 2 Allen (Mass.) 52.

¹³⁴ 10 Wall. 383, 19 L. Ed. 987.

¹³⁵ Section 15 (5).

¹³⁶ Section 14 (3).

Sale of Specific Chattel.

So far as concerns the sale of ascertained goods, which the buyer has inspected or has had an opportunity of inspecting, and of which the seller is not the manufacturer or grower, the rule caveat emptor admits of no exceptions by implied warranty of quality.¹³⁷ Benjamin states the rule without any qualification in respect to goods of which the seller is the manufacturer or grower,¹³⁸ but this qualification occurs generally in the statement of the rule in this country,¹³⁹ and it has sometimes been held that in such sales there is an implied warranty that the goods are free from latent defects resulting from the process of manufacture or cultivation which would render them unfit for the use for which they were designed.¹⁴⁰ In the rule of caveat emptor there is no hardship, for, if the buyer mistrusts

¹³⁷ *Parkinson v. Lee*, 2 East, 814; *Chanter v. Hopkins*, 4 Mee. & W. 399; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. Ed. 987; *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437; *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Welmer v. Clement*, 37 Pa. 147, 78 Am. Dec. 411; *Sellers v. Stevenson*, 163 Pa. 262, 29 Atl. 715; *Rice v. Forsyth*, 41 Md. 389; *Burnett v. Stanton*, 2 Ala. 195; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 819; *National Oil Co. v. Rankin*, 68 Kan. 679, 75 Pac. 1013; *National Cotton Co. v. Young*, 74 Ark. 144, 85 S. W. 92, 109 Am. St. Rep. 71. The rule of caveat emptor is probably universal in the United States, except in South Carolina (*Barnard v. Yates*, 1 Nott & McC. 142), and Louisiana (*McLellan v. Williams*, 11 La. Ann. 721).

¹³⁸ *Benj. Sales*, § 644.

¹³⁹ *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. Ed. 987, and cases cited in note 137. See, also, *Jones v. Just*, L. R. 3 Q. B. 197, per Mellor, J.

¹⁴⁰ *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 8 Sup. Ct. 537, 28 L. Ed. 86. See, also, *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Beers v. Williams*, 16 Ill. 69; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (latent defects in seeds arising from improper cultivation); *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. Supp. 388; *Prentice v. Fargo*, 53 App. Div. 608, 65 N. Y. Supp. 1114, affirmed 173 N. Y. 593, 65 N. E. 1121; post, p. 259. Where the buyer bought a bull for breeding purposes to the knowledge of the seller, paying full price, and the bull proved impotent, no warranty was implied. *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 89 Am. St. Rep. 864.

his judgment, he can require of the seller a warranty. If he inspects or declines to do so, and is satisfied without a warranty, he takes upon himself the risk of the goods being unmerchantable, or otherwise failing to possess the qualities which he desires.

It must be borne in mind, however, that if specific goods are sold by description, even though the buyer has an opportunity for examination, if the failure to comply with the description is not discoverable by examination, a warranty that they shall correspond with the description is implied.¹⁴¹

Warranty of Fitness for Purpose.

Where a buyer orders an article for a particular purpose, which he, expressly or by implication, makes known to the seller,¹⁴² and the article is of the kind manufactured by the seller or in which he deals, and the buyer relies on the judgment or skill of the seller to furnish a suitable article, an implied war-

¹⁴¹ Ante, p. 251. It would seem, however, that where the sale is by description, but the buyer inspects and accepts the specific article sold, the undertaking of the seller arising from the description is an express warranty, such as results from any affirmation of fact the natural tendency of which is to induce the sale, and on which the buyer relies. It would then be a question for the jury whether the description was intended by the parties as a warranty. Thus where the buyer, after examination, bought what the auctioneer erroneously stated to be blue vitriol, it was held that it was a question for the jury whether the representation at the sale amounted to a warranty. *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595. See *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

¹⁴² The purpose "may be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent, but leading up, to the contract itself." *Gillespie v. Cheney* (1896) 2 Q. B. 59. See also, *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

The purpose may appear from the description of the article desired. *Preist v. Last* (1903) 1 K. B. 148 ("hot water bottle"); *Little v. G. E. Von Syckle & Co.*, 115 Mich. 480, 73 N. W. 554 (piano).

Where the article is one which may be applied to various purposes, the buyer must particularize the particular purpose. *Jones v. Padgett*, 24 Q. B. Div. 650; *Hight v. Bacon*, 128 Mass. 10, 80 Am. Rep. 639.

ranty arises that the article shall be reasonably fit for such purpose.¹⁴³ "Where a manufacturer or a dealer," it was said in a leading case,¹⁴⁴ "contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it was to be applied. In such case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own." The rule rests upon the ground that the buyer trusts to the seller to supply a suitable article, and not to his own inspection or instructions as to its character.¹⁴⁵ Therefore, if the buyer orders a specific article, or a known, described, or defined article, although he

¹⁴³ *Jones v. Bright*, 5 Bing. 533; *Jones v. Just*, L. R. 3 Q. B. 197, 208, 37 Law J. Q. B. 89; *Randall v. Newson*, 2 Q. B. Div. 102; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 106, 3 Sup. Ct. 537, 28 L. Ed. 86; *Harris v. Waite*, 51 Vt. 480, 31 Am. Rep. 694; *Byers v. Chaplin*, 28 Ohio St. 300; *Gerst v. Jones*, 32 Grat. (Va.) 518; *Merrill v. Nightingale*, 39 Wis. 247; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *West Michigan Furniture Co. v. Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Alpha Check-Rower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318, 45 N. E. 524; *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 120 Fed. 906, 57 C. C. A. 496; *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. Supp. 84; *Queen City Glass Co. v. Clay Pot Co.*, 97 Md. 429, 55 Atl. 447; *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 120 Fed. 906, 57 C. C. A. 496; *Lenz v. Blake-McFall Co.*, 44 Or. 569, 76 Pac. 356.

Where a producer and dealer in horses for breeding purposes sold a horse to one whom he knew desired a horse for such purpose, there was an implied warranty that it was reasonably fit therefor. *Merchants' & Mechanics' Sav. Bank v. Frazee*, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

¹⁴⁴ *Jones v. Just*, *supra*, per Mellor, J.

¹⁴⁵ *Dodge v. Manufacturing Co.*, 113 Fed. 218, 51 C. C. A. 175; *Gardner v. T. J. Winter & Co.*, 117 Ky. 382, 78 S. W. 143, 63 L. R. A. 647; *H. H. Franklin Mfg. Co. v. Manufacturing Co.*, 189 Mass. 344, 75 N. E. 624; *Troy Grocery Co. v. Potter & Wrightington*, 139 Ala. 359, 36 South. 12.

If the seller disclaims knowledge of the article or its fitness, the buyer does not rely on his judgment and skill. *Englehardt v. Clanton*, 83 Ala. 336, 3 South. 680; *Gage v. Carpenter*, 107 Fed. 866, 47 C. C. A. 39.

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informs the seller that he wants it for a particular purpose, there is no implied warranty.¹⁴⁶

The rule is generally held to apply to dealers as well as to manufacturers;¹⁴⁷ but some courts confine it to manufacturers

¹⁴⁶ *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Seltz v. Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 40, 35 L. Ed. 837; *Dounce v. Dow*, 64 N. Y. 411; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149; *Mason v. Chappell*, 15 Grat. (Va.) 572; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *McCray Refrigerator & C. S. Co. v. Woods*, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; *Frederick Mfg. Co. v. Devlin*, 127 Fed. 71, 62 C. C. A. 53; *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *Day v. Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Gregg v. Belting Co.*, 69 N. H. 247, 46 Atl. 26; *Evans v. Laury*, 67 N. J. Law, 153, 50 Atl. 355; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; *American Home Sav. Bank Co. v. Trust Co.*, 210 Pa. 320, 59 Atl. 320; *Beggs v. Brewing Co.*, 27 R. I. 385, 62 Atl. 873; *McCormick Lumber Co. v. Winous*, 126 Wis. 649, 105 N. W. 945; *Cleveland Punch & Shear Works v. Carbon Co.*, 75 Ohio St. 153, 78 N. E. 1009. Otherwise where the seller expressly warrants fitness, upon specifications of his own. *Iroquois Furnace Co. v. Manufacturing Co.*, 181 Ill. 582, 54 N. E. 987. There is no implied warranty that bricks to be furnished of a specified grade, and of good quality equal to sample, shall be fit for their purpose, though the seller have notice of it. *Wisconsin Red Pressed Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165; *Id.*, 60 Minn. 401, 62 N. W. 550, 51 Am. St. Rep. 539; *Id.*, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418.

"In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." Sales Act, § 15 (4). This follows the proviso in Sale of Goods Act, § 14 (1), which "is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam plows or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise." *Gillespie v. Cheney* (1896) 2 Q. B. 59, per Lord Russell, C. J. (not applicable where buyer buys cargo of coal for bunkering steamers).

¹⁴⁷ *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; *Morse v. Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Baumbach Co. v. Gessler*, 79 Wis. 567, 48 N. W. 802; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389; *Little v. G. E. Van Syckle & Co.*, 115 Mich.

and growers, and exclude mere dealers.¹⁴⁸ And some courts confine the warranty of the manufacturer or grower to latent defects which result from and could be avoided in the process of manufacture or cultivation, thus excluding liability for latent defects in materials purchased by the manufacturer, if the defects were unknown to him, and could not have been ascertained by proper examination.¹⁴⁹ It has been held by other courts, however, that the warranty of fitness for a particular purpose extends even to latent defects in materials undiscoverable by the manufacturer or grower.¹⁵⁰ Thus, where a carriage builder supplied a carriage pole which broke and injured the buyer's horses, it was held immaterial that the defect could not have been discovered by the exercise of reasonable skill.¹⁵¹

480, 73 N. W. 554. See, also, *McCaa v. Drug Co.*, 114 Ala. 74, 21 South. 479, 62 Am. St. Rep. 88; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. R. 973.

The rule applies to a quarryman. *Rhind v. Freedley* (N. J. Sup.) 64 Atl. 963. See Sales Act, § 15 (1), "whether he be the grower or manufacturer or not."

¹⁴⁸ *American Forcite Powder Mfg. Co. v. Brady*, 4 App. Div. 95, 88 N. Y. Supp. 545; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592. See, also, *Dounce v. Dow*, 64 N. Y. 411; *Healy v. Brandon*, 21 N. Y. Supp. 390, 66 Hun. 515, affirmed 142 N. Y. 681, 37 N. E. 825; *Reynolds v. Electric Co.*, 141 Fed. 551, 73 C. C. A. 23.

¹⁴⁹ *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163 (not for latent defect in material used which the manufacturer is not shown, and cannot be presumed, to have known); *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Bierman v. Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635; *Howard Iron Works v. Elevating Co.*, 113 App. Div. 562, 99 N. Y. Supp. 163; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102; *McKinnon Mfg. Co. v. Fish Co.*, 102 Mich. 221, 60 N. W. 472; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 69 N. W. 1001, 64 Am. St. Rep. 418; *Tennessee River Compress Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389; *Reynolds v. Electric Co.*, 141 Fed. 551, 73 C. C. A. 23. See, also, *The Nimrod* (D. C.) 141 Fed. 215, affirmed *Union Iron Works v. Spottswood*, 141 Fed. 834, 72 C. C. A. 300.

¹⁵⁰ *Randall v. Newson*, 2 Q. B. Div. 102; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Frost v. Dairy Co.* (1905) 1 K. B. 608 (milk containing typhoid germs); *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602.

¹⁵¹ *Randall v. Newson*, 2 Q. B. Div. 102.

Where the buyer prescribed the materials and dimensions of a

Warranty of Merchantableness.

In a sale of goods by description, where the buyer has not had an opportunity to examine them, there is, in addition to the implied condition or warranty that the goods shall answer the description, an implied warranty that they shall be salable or merchantable.¹⁵² The rule is usually confined to sales by description, where the buyer had not an opportunity to examine; ¹⁵³ but under the English Sale of Goods Act, and the proposed American Sales Act, the condition or warranty of merchantableness is excluded only by an actual examination, and then only as to defects which such an examination ought to have revealed.¹⁵⁴ No accurate definition of the term "merchantable" can be given, but it has been said that the goods must be "at least of medium quality or goodness."¹⁵⁵

forging to be used for a piston rod, the seller was liable only for ordinary care in selecting the material and forging it, and not for defects not discoverable by such care. *Rollins Engine Co. v. Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441.

¹⁵² *Jones v. Just*, L. R. 3 Q. B. 197, 37 Law J. Q. B. 89; *Drummond v. Van Ingen*, 12 App. Cas. 284, 290; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Warner v. Ice Co.*, 74 Me. 475; *Fitch v. Archibald*, 29 N. J. Law, 160; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Merrillam v. Field*, 39 Wis. 578; *McClung v. Kelley*, 21 Iowa, 508; *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Bunch v. Well Bros. & Bauer*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; *Camplon v. Marston*, 99 Me. 410, 59 Atl. 548. See Sales Act, § 15 (2); Sale of Goods Act, § 14 (2).

Defendant sold to plaintiff in bulk all the ice stored in certain icehouses, with the understanding that plaintiff purchased it to resell in the general course of the ice business in a city. Defendant did not put up the ice, but bought it after it was stored, and had never seen it, and so stated to plaintiff, also telling him from whom he purchased it, and that he had no other information as to its condition or quality than the statements of such seller. Held, that under such circumstances there was no implied warranty by defendant that the ice was all of merchantable quality. *Gage v. Carpenter*, 107 Fed. 686, 47 C. C. A. 39.

¹⁵³ Cases cited note 152, *supra*.

¹⁵⁴ Sale of Goods Act, § 14 (2); Sales Act, § 15 (3).

¹⁵⁵ *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572. See also *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290 ("of medium quality or goodness, free from such defects as would render it un-

When the goods are to be shipped to the buyer, or to be delivered to him, at a particular place, so that the property does not pass, the goods remain at the seller's risk until delivery.¹⁵⁶ The seller must, therefore, stand the risk of any extraordinary or unusual deterioration;¹⁵⁷ but the buyer takes the risk of any deterioration necessarily incident to the transit, and the warranty of merchantableness does not extend to such deterioration.¹⁵⁸ The goods must, however, be fit for shipment; that is, such that, allowing for necessary deterioration, they will arrive in merchantable condition.¹⁵⁹

Warranty in Sale of Provisions.

Blackstone says that in contracts for provisions it is always implied that they are wholesome, and that if they are not an action on the case lies against the seller.¹⁶⁰ But in England it is now held that they are governed by the same rules as other commodities; that is, that, in the sale of provisions in which the buyer has an opportunity for inspection, no warranty is implied;¹⁶¹ but that, if the buyer trusts to the seller's judgment

merchantable or unfit for the purpose for which it is ordinarily used").

¹⁵⁶ Ante, p. 156.

¹⁵⁷ Bull v. Robinson, 10 Exch. 342, per Alderson, B.

¹⁵⁸ Bull v. Robinson, 10 Exch. 342, 24 Law J. Exch. 165; Leggat v. Brewing Co., 60 Ill. 158; Mann v. Everston, 32 Ind. 355; English v. Commission Co., 57 Fed. 451, 6 C. C. A. 416; post, p. 293. A fortiori where the property passes on shipment. Mobile Fruit & Trading Co. v. McGuire, 81 Minn. 232, 83 N. W. 833; Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891.

When defendant, after inspecting plaintiff's orchard, contracted in November for all plaintiff's oranges, to be taken by defendant on or before April 1st, and paid for on delivery, plaintiff to deliver when wanted by defendant, and the oranges were ripe in January, but defendant refused to accept them till March, the implied warranty, if any, extended only to merchantableness on the trees, and did not entitle defendant to refuse oranges because too ripe. Bill v. Fuller, 146 Cal. 50, 79 Pac. 592.

¹⁵⁹ Beer v. Walker, 46 L. J. C. P. 677. See, also, Mann v. Everston, 32 Ind. 355; Carleton v. Lombard, Ayers & Co., 149 N. Y. 137, 43 N. E. 422; McHenry v. Bulifant, 207 Pa. 15, 58 Atl. 226; Truschel v. Dean, 77 Ark. 546, 92 S. W. 781; Atkins Bros. Co. v. Grain Co., 119 Mo. App. 119, 95 S. W. 949.

¹⁶⁰ 3 Bl. Comm. 166.

¹⁶¹ Burnby v. Bollett, 16 Mees. & W. 644; Emmerton v. Mathews,

to select them, there is an implied warranty that they are fit for their purpose, viz., human food.¹⁰²

In the United States it has been held in some cases that on a sale of provisions there is an implied warranty that they are fit for consumption;¹⁰³ but the rule is generally confined to sales by dealers where the goods are bought for domestic use—that is, it does not apply where they are sold as merchandise.¹⁰⁴

IMPLIED WARRANTIES IN SALE BY SAMPLE.

79. In the case of a contract to sell or a sale by sample—

- (a) There is an implied warranty (sometimes called a “condition”) that the bulk shall correspond with the sample in quality.

7 Hurl. & N. 586, 31 Law J. Exch. 139; *Smith v. Baker*, 40 Law T. (N. S.) 261.

¹⁰² *Bligge v. Parkinson*, 7 Hurl. & N. 955, 31 Law J. Exch. 301; *Beer v. Walker*, 46 Law J. C. P. 677, 25 Wkly. Rep. 880.

¹⁰³ *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 463, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Hoover v. Peters*, 18 Mich. 51. See, Also, *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327; *Copas v. Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. Cf. *Burch v. Spencer*, 15 Hun (N. Y.) 504.

¹⁰⁴ *Moses v. Mead*, 1 Denio (N. Y.) 378, 43 Am. Dec. 676; *Id.*, 5 Denio (N. Y.) 617; *Winsor v. Lombard*, 18 Pick. (Mass.) 57, 62, per Shaw, C. J.; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Ryder v. Neitge*, 21 Minn. 70; *Hanson v. Hartse*, 70 Minn. 282, 73 N. W. 163, 68 Am. St. Rep. 527; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Warren v. Buck*, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754. See, also, *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608. But see *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 267, 23 N. E. 372, 16 Am. St. Rep. 753. If a farmer, not a dealer, kills a hog, and sells it, knowing that the purchaser intends to eat it, there is no implied warranty that the hog is fit for food. *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472.

A waterworks company, distributing water for domestic use, does not warrant the purity of the water. *Green v. Water Co.*, 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911.

Under Sales Act, § 15, it seems that there is no implied warranty unless the case falls under subsections (1) or (2). Cf. section 14.

- (b) There is an implied warranty (sometimes called a "condition") that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
- (c) If the seller is a manufacturer, and in some jurisdictions if he is a dealer in goods of that kind, there is an implied warranty (sometimes called a "condition") that the goods shall be free from any defect rendering them unmerchantable which would not be apparent upon reasonable examination of the sample.¹⁶⁵

It is not to be assumed that every sale where a sample is shown is a sale by sample; for the seller may show a sample and refuse to sell by it, requiring the buyer to inspect the bulk and to form his own judgment, or the buyer may decline to rely on the sample and require an express warranty. It must appear that it was a term of the contract, express or implied, that the sale was by sample.¹⁶⁶ If the contract is in writing and makes no mention of a sample, evidence is inadmissible to show that the sale was by sample.¹⁶⁷

Where, however, the sale is by sample, a warranty is implied that the bulk shall correspond in quality with the sample.¹⁶⁸ The reason for the implication is that there is no opportunity for personal examination of the bulk.¹⁶⁹

¹⁶⁵ See Sales Act, § 16. Cf. Sale of Goods Act, § 15.

¹⁶⁶ *Walter A. Wood Harvester Co. v. Ramberg*, 60 Minn. 219, 61 N. W. 1132; *Smith v. Coe*, 55 App. Div. 585, 67 N. Y. Supp. 850; *Bunch v. Well Bros. & Bauer*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80.

"To constitute a sale by sample, in the legal sense of that term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood that they were dealing with the sample with an understanding that the bulk was to be like it." *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963, per Mitchell, J.

¹⁶⁷ *Gardiner v. Gray*, 4 Camp. 144; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; ante, p. 237.

¹⁶⁸ *Parker v. Palmer*, 4 Barn. & Ald. 387, 391; *Carter v. Crick*, 4 Hurl. & N. 412, 28 Law J. Exch. 238; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359, 370, 17 L. Ed. 642; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Williams v. Spafford*, 8 Pick. (Mass.) 250;

¹⁶⁹ See note 169 on following page.

If the goods do not correspond with the sample, the buyer may return them, unless he has accepted them, or the contract relates to specific goods the property in which has passed.¹⁷⁰ Whether the undertaking of the seller be called a condition or a warranty, its performance, if the property has not passed, is a condition precedent to the obligation of the buyer to accept the goods.¹⁷¹

The buyer is entitled to a reasonable opportunity of comparing the bulk with the same, and on a refusal of the seller to allow such comparison the buyer may repudiate the contract.¹⁷²

If the sample contains latent defects, which would render the goods unmerchantable, and which would not be apparent

Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Merriman v. Chapman*, 32 Conn. 146; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Gunther v. Atwell*, 19 Md. 157; *Hanson v. Busse*, 45 Ill. 496; *Hubbard v. George*, 49 Ill. 275; *Graff v. Foster*, 67 Mo. 512; *Brigham v. Retelsdorf*, 73 Iowa, 712, 36 N. W. 715. It seems that in Pennsylvania the warranty implied in a sale by sample, unless there are circumstances to indicate that the sample is to be taken as a standard of quality, is only a guaranty that the bulk shall correspond in kind and be merchantable. *Boyd v. Wilson*, 83 Pa. 319, 24 Am. Rep. 176. See *Benj. Sales* (Corbin's Ed.) § 969, note 26.

¹⁶⁹ "If the purchaser distrusts his judgment, he can require * * * a warranty that the quality or condition of the goods * * * corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect, and declines to do it, he takes upon himself the risk that the article is merchantable; and he cannot relieve himself and charge the seller on the ground that the examination will occupy time and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent." *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. Ed. 987, per Davis, J.

¹⁷⁰ *Hellbutt v. Hickson*, L. R. 7 C. P. 438; *Conston v. Chapman*, L. R. 2 Sc. App. 250, at page 254; *Azemar v. Casella*, L. R. 2 C. P. 431; *Butler v. Northumberland*, 50 N. H. 33; *Boothby v. Plaisted*, 51 N. H. 436, 438, 12 Am. Rep. 140; *Magee v. Billingsley*, 3 Ala. 679; *Hardt v. Electric Co.*, 84 App. Div. 249, 82 N. Y. Supp. 835; post, p. 365.

¹⁷¹ See *Sales Act*, § 11 (2).

¹⁷² *Lorymer v. Smith*, 1 B. & C. 1. See, also, *Pope v. Allis*, 115

on reasonable examination of the sample, a further warranty is implied that goods shall be free from such defects. Such, at least, is the rule where the seller is the manufacturer,¹⁷³ though it has been held otherwise where he is not the manufacturer.¹⁷⁴

Warranty that Goods are of Seller's Manufacture.

Where there is a contract for the sale of goods by a manufacturer, as such, it seems that it was the law that in England there is, in the absence of any trade usage to the contrary, an implied warranty that the goods are of the seller's own manufacture.¹⁷⁵ This question does not appear to have been raised in the United States.

Fulfillment of Warranty a Condition.

As has been pointed out, these implied warranties of quality are often termed "conditions."¹⁷⁶ While the term "warranty" has been retained, it must be borne in mind that they are not mere warranties in the narrow sense of the term, and that, where the property has not passed, the buyer may treat the fulfillment of the warranty as a condition of his obligation to accept the goods.¹⁷⁷

Whether an Express Excludes an Implied Warranty.

Where a warranty arises by implication of law, it may of course be negated or varied by express agreement.¹⁷⁸ The

U. S. 363, 6 Sup. Ct. 60, 20 L. Ed. 393; Benj. Sales, § 594; Sales Act, § 16 (b). Cf. section 14; post, p. 294.

The terms of the contract may negative the right of inspection. Polenghi v. Milk Co., 49 Sol. J. 120.

¹⁷³ Hellbutt v. Hickson, L. R. 7 Q. P. 438, 456; Drummond v. Van Ingen, 12 App. Cas. 284; Nixa Canning Co. v. Grocer Co., 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653.

¹⁷⁴ Parkinson v. Lee, 2 East, 314 (doubted by Brett, J. A., in Randall v. Newson, 2 Q. B. Div. 102); Dickinson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656. See Sales Act, § 16 (c), "If the seller is a dealer." Cf. Sale of Goods Act, § 15 (2) (c).

¹⁷⁵ Johnson v. Raylton, 7 Q. B. Div. 438, per Brett, L. J., Cotton, L. J., and Bramwell, L. J., dissenting. S. Ct.

A clause to this effect in the draft of the Sale of Goods Act was cut out in committee. Chalm. Sale of Goods Act (6th Ed.) 36.

¹⁷⁶ Ante, p. 230.

¹⁷⁷ Ante, p. 226; post, p. 365.

¹⁷⁸ Burnett v. Hensley, 118 Iowa, 575, 92 N. W. 678; Dowagiac

parties may alter at will the obligations which the law implies from the general nature of the contract. As a rule, upon the principle, "Expressum facit cessare tacitum," an express warranty excludes an implied one upon the same subject.¹⁷⁹ Thus, where there is an express warranty of quality, no warranty of fitness for a particular purpose will be ordinarily implied.¹⁸⁰ And an express warranty of quality ordinarily excludes an implied warranty of merchantableness.¹⁸¹ It seems, however, that, while an express warranty as a rule excludes an implied warranty on the same subject, it will not be held to have that effect if such does not appear to be the intention of the parties.¹⁸² "It is true that, as a general rule, no warranty will be

Mfg. Co. v. Mahon, 13 N. D. 518, 101 N. W. 903; *Bagley v. Extin-gulsher Co.*, 150 Fed. 284, 80 C. C. A. 172. See Sales Act, § 71.

¹⁷⁹ *Dickson v. Zizinia*, 10 C. B. 602, 20 Law J. C. P. 73; *Deming v. Foster*, 42 N. H. 165, 175; *McGraw v. Fletcher*, 35 Mich. 104; *Johnson v. Latimer*, 71 Ga. 470; *International Pavement Co. v. Machine Co.*, 17 Mo. App. 284; *Bucy v. Agricultural Works*, 89 Iowa, 464, 56 N. W. 541; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143.

¹⁸⁰ *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *Dwight Bros. Paper Co. v. Paper Co.*, 114 Wis. 414, 90 N. W. 444; *La Crosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N. W. 1094; *Reynolds v. Electric Co.*, 141 Fed. 551, 73 C. C. A. 23 (*Cf. Parsons Band-Cutter & Self-Feeder Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580); *Reeves & Co. v. Byers*, 155 Ind. 535, 58 N. E. 713; *Lombard Water-Wheel Governor Co. v. Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180; *Monroe v. Hickox, Mull & Hill Co.*, 144 Mich. 30, 107 N. W. 719.

¹⁸¹ *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896. The contract was for the sale of varnish, and provided: "These goods to be exactly the same quality as we make" for certain third persons, "and as per sample bbls. delivered"—and continued: "Turpentine copal varnish at 65 cents per gallon; turpentine japan dryer at 55 cents per gallon." It was held that the latter terms were but stipulations as to price, and imported no warranty that the goods delivered should be known to the trade by those names and of a certain standard of quality. It is to be observed that the quality of the goods was expressly fixed by reference to certain other goods, and this express warranty might well be construed as excluding any implied warranty of quality. *Lamar, J.*, observes, however, "that there are numerous well-considered cases that an express warranty of quality excludes an implied warranty that the articles sold are merchantable or fit for their intended use."

¹⁸² See Sales Act, § 15 (6), "unless inconsistent therewith."

implied where the parties have expressed in words the warranty by which they mean to be bound; but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract."¹⁸³ And it was said in an English case: "The doctrine that an express provision excludes implication * * * does not affect cases in which the express provision appears * * * to have been superadded for the benefit of the buyer."¹⁸⁴ Thus a warranty that troop stores should pass inspection of the East India Company's officers was held not to exclude an implied warranty that the stores should be reasonably fit for consumption by the troops.¹⁸⁵

¹⁸³ *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282, 44 N. W. 548. See, also, *Alpha Check Rower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Timken Carriage Co. v. C. S. Smith & Co.*, 123 Iowa, 554, 99 N. W. 183.

Where plaintiff had no opportunity to inspect the machinery sold, and defendant knew the purposes for which it was required, there is an implied warranty that it shall be fit for such purposes; such implied warranty not being inconsistent with, or excluded by, the express agreement in the contract that the machinery should be of a certain power and in good order, except from exposure to the weather. *Blackmore v. Fairbanks, Morse & Co.*, *supra*.

Where a contract of sale provided that the machine sold must be paid for before delivery in order that an express warranty contained in the contract should become effective, and delivery was made by the seller before payment was demanded, and the buyer refused to settle until after a trial of the machine, the seller acquiescing, there was a waiver of the express warranty, and the buyer could rely upon the warranty, implied by law, that the machine was adapted to the use intended. *Parsons Band-Cutter & Self-Feeder Co. v. Mallinger*, 122 Iowa, 708, 98 N. W. 580.

¹⁸⁴ *Mody v. Gregson*, L. R. 4 Exch., at page 53, per Willes, J. See *Drummond v. Van Ingen*, 12 App. Cas. 284; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 628; *Wilcox v. Owens*, 64 Ga. 601; *Austin v. Cox*, 60 Ga. 521.

¹⁸⁵ *Bigge v. Parkinson*, 7 Hurl. & N. 955, 31 Law J. Exch. 801.

CHAPTER VIII.

PERFORMANCE OF CONTRACT.

- 80-81. In General.
- 82. Delivery.
- 83-85. Place, Time, and Manner of Delivery.
- 86-88. Delivery of Wrong Quantity.
- 89. Delivery by Installments.
- 90-91. Delivery to Carrier.
- 92-93. Buyer's Right to Examine Goods.
- 94. Acceptance.
- 95-96. Payment.
- 97-99. Excuses for Nonperformance of Conditions.

IN GENERAL.

80. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.¹

81. PAYMENT AND DELIVERY CONCURRENT CONDITIONS. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.²

As we have seen, where specific goods are sold, and nothing is said as to the time of payment, the presumption is that the sale is for cash, and not on credit. The property passes,³ but subject to the seller's lien; and neither is the seller bound to deliver possession of the goods, nor is the buyer bound to pay the price, except upon performance by the other party.⁴ In

¹ Sales Act, § 41; Sale of Goods Act, § 28.

² Sales Act, § 42; Sale of Goods Act, § 27.

³ Ante, p. 121.

⁴ *Bloxam v. Sanders*, 4 Barn. & C. 941, 948, per Bayley, J.; *Leonard v. Davis*, 1 Black (U. S.) 476, 17 L. Ed. 222; *Tipton v. Feltner*, 20 N. Y. 423; *Allen v. Hartfield*, 76 Ill. 358; *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119.

executory contracts of sale, where the parties have not otherwise agreed, the rule as to the concurrent duty of delivery and payment is the same. Neither party can enforce the contract against the other without showing readiness and willingness to perform.⁵ It is not necessary, in order to maintain an action on the contract, to show actual tender; readiness and willingness is enough.⁶

While the presumption is in favor of a cash sale, and hence that delivery and payment are concurrent conditions, the parties may, of course, make whatever bargain they please; and, if the bargain is that the sale is on credit, the buyer is entitled to the immediate delivery of the goods;⁷ though, as we shall see, if he fails to take the goods, and afterwards becomes insolvent, or if the term of credit expires before he exercises his right to take the goods, the seller's lien revives.⁸

DELIVERY.

82. MEANING. "Delivery" means voluntary transfer of possession, actual or constructive, from the seller to the buyer.

⁵ *Morton v. Lamb*, 7 Term R. 125; *Rawson v. Johnson*, 1 East, 203; *Porter v. Rose*, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; *Cook v. Ferral's Adm'rs*, 13 Wend. (N. Y.) 285; *Robison v. Tyson*, 46 Pa. 286; *Hapgood v. Shaw*, 105 Mass. 276; *Phelps v. Hubbard*, 51 Vt. 489; *Hough v. Rawson*, 17 Ill. 588; *Stoolfire v. Royse*, 71 Ill. 223; *Posey v. Scales*, 55 Ind. 282; *Simmons v. Green*, 35 Ohio St. 104; *Sousely v. Burns' Adm'r*, 10 Bush (Ky.) 87; *Walter v. Reed*, 34 Neb. 544, 52 N. W. 682; *Sanborn v. Shipherd*, 59 Minn. 144, 60 N. W. 1089; *Campbell v. Moran Bros. Co.*, 97 Fed. 477, 38 C. C. A. 293; *Catlin v. Jones (Or.)* 85 Pac. 515.

⁶ *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 Bos. & P. 447; *Jackson v. Allaway*, 6 Man. & G. 942; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117; *Catlin v. Jones (Or.)* 85 Pac. 515.

⁷ *Bloxam v. Sanders*, 4 Barn. & C. 941, 948, per Bayley, J.; ante, p. 122; post, p. 314.

⁸ Post, p. 315.

PLACE, TIME, AND MANNER OF DELIVERY.

- 83. PLACE.** Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and, if not, his residence; but, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.⁹
- 84. TIME.** Where, under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.¹⁰
- 85. MANNER.** As a rule, where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf. But the transfer of a bill of lading, and in some jurisdictions the transfer of a warehouse receipt, operates as a delivery of the goods.¹¹

Meaning of Delivery.

"Delivery," in general, may be defined as the voluntary transfer of possession from one person to another.¹² Benjamin points out¹³ that the word "delivery" is unfortunately

⁹ Following Sale of Goods Act, § 29 (1); Sales Act, § 43 (1).

Referring to the above subsection, Judge Chalmers says that as regards the place of delivery there was no authority in point, but it seems substantially to express the American law. Post, p. 275.

¹⁰ Sale of Goods Act, § 29 (2); Sales Act, § 43 (2).

¹¹ Sale of Goods Act, § 29 (3). See, also, Sales Act, § 43 (3), which adds: "But as against all others than the seller the buyer shall be regarded as having received delivery from the time when such person first has notice of the sale." Cf. section 25; ante, p. 206.

In jurisdictions where delivery is essential to transfer the property against third persons, it has been held sufficient to constitute delivery if notice of the sale be given to the person in possession and he does not dissent. Ante, p. 207. See, also, *Freiberg v. Steenbock*, 54 Minn. 509, 58 N. W. 175. But see *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433.

¹² See Sale of Goods Act, § 62; Sales Act, § 76; Pol. Poss. 43, 46.

¹³ Benj. Sales, § 674 et seq.

used in very different senses: (1) In the sense of transfer of title or property; (2) in the sense of delivery of possession, as the correlative of the "actual receipt" required by the statute of frauds; (3) in the sense of delivery of possession in performance of the contract; and (4) in the sense of delivery of possession sufficient to destroy the seller's lien, or even his right of stoppage in transitu. Much confusion is caused by the varying senses in which this term is employed. "But," as Judge Chalmers remarks,¹⁴ "it would perhaps be more correct to say that a delivery which is effective for one purpose is ineffectual for other purposes. For instance, delivery to a carrier generally passes the property to the buyer, but does not defeat the right of stoppage in transitu, while delivery by the carrier to the consignee does defeat that right." As we have seen, mere delivery does not of itself ever effect a transfer of the title or property; whether the property passes depends solely upon the intention of the parties.¹⁵ Delivery under the statute of frauds has already been considered.¹⁶ Delivery as affecting the seller's lien¹⁷ and the right of stoppage in transitu¹⁸ will be considered later. The question with which we are here concerned is what delivery is effectual in performance of the contract, so as to enable the seller to defend an action for nondelivery.

Constructive Delivery.

Delivery by agreement or attornment has already been discussed in considering what delivery is necessary to constitute "actual receipt" under the statute of frauds.¹⁹ As we have seen, such delivery may take place in three classes of cases: (1) Where the seller is in possession of the goods, and after the sale attorns to the buyer, and continues to hold the goods as his bailee; (2) when the buyer is in possession of the goods as bailee, and after the sale, with the seller's assent, continues to hold on his own account; (3) where a third person is in pos-

¹⁴ Sale of Goods Act (6th Ed.) p. 122.

¹⁵ Ante, p. 119. But in some jurisdictions delivery is essential to transfer the property, under some circumstances, as against third persons. Ante, p. 204.

¹⁶ Ante, p. 93 et seq.

¹⁷ Post, p. 317.

¹⁸ Post, p. 329 et seq.

¹⁹ Ante, p. 98.

session of the goods as bailee of the seller, and such third person, with the consent of the seller, attorns to the buyer, and continues to hold as his bailee.

To these classes of constructive delivery may be added a fourth; that is, where the goods are not in the custody of any person, as timber lying at the disposal of the seller on the premises of a person from whom he bought it, or at a public wharf, or logs floating in a river.²⁰

It seems that whatever will constitute such a delivery as to satisfy the statute of frauds will constitute delivery in performance of the contract.

Symbolical Delivery.

Lord Ellenborough said in *Chaplin v. Rogers*²¹ that "where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by what is tantamount, such as the delivery of a key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property." Although delivery by giving a key of the place where the goods are stored is frequently classed as symbolical delivery,²² Sir F. Pollock shows that the key is not the symbol of the goods, but that the transaction "consists of such a transfer as the nature of the case admits, and as will practically suffice for causing the new possession to be recognized as such."²³ But the bill of lading is universally recognized as the symbol of the goods, and the transfer of the bill of lading operates as a symbolical delivery of them.²⁴ So, also, the transfer of the grand bill of sale of a vessel at sea constitutes a sufficient delivery of the vessel.²⁵ The common law drew a hard and fast line of distinction, says Judge Chalmers,²⁶ between the transfer of the bill of

²⁰ Post, p. 274.

²¹ 1 East, 192. See, also, *Ellis v. Hunt*, 3 Term R. 464, per Lord Kenyon; *Packard v. Dunsmore*, 11 Cush. (Mass.) 282.

²² *Vining v. Gilbreth*, 39 Me. 496; *Barr v. Reitz*, 53 Pa. 256.

²³ Pol. Poss. 61.

²⁴ *Sanders v. MacLean*, 11 Q. B. Div. 327, 341; ante, p. 33; post, p. 333.

²⁵ *Atkinson v. Maling*, 2 Term R. 462; *Crapo v. Kelly*, 16 Wall. (U. S.) 610, 640, 21 L. Ed. 430. See ante, p. 207.

²⁶ Chalmers, *Sale of Goods Act* (6th Ed.) p. 71.

lading and other documents, such as dock and wharf warrants, and warehouse receipts, the transfer of which operates only as a token of authority to take possession, and not as a transfer of possession.²⁷ It is possible, however, that the transfer of such a document, making the goods deliverable to order, if the goods represented by the instrument were subject to no liens or charges, would be sufficient in performance of the contract, on the ground of an attornment in advance.²⁸

And in some jurisdictions, in accordance with the mercantile understanding, warehouse receipts are treated as standing on the same footing as bills of lading.²⁹

Seller not Bound to Send Goods.

In the absence of a contrary agreement, the seller is not bound to send or carry the goods to the buyer. He does all

²⁷ Ante, p. 96; post, p. 319. In *Farina v. Home*, 16 Mees. & W. 119, it was held that the indorsement by the seller to the buyer of a delivery warrant, signed by a wharfinger, making the goods deliverable to the seller or his assignee by indorsement on payment of rent and charges, did not constitute an actual receipt under the statute of frauds, in the absence of attornment by the wharfinger. Cf. *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433, per Holmes, J. Many of the cases which discuss the question of symbolical delivery turn simply upon the transfer of the property from seller to buyer—a fact which must always be carefully borne in mind. See *Leonard v. Davis*, 1 Black (U. S.) 476, 17 L. Ed. 222; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9, 99 Am. Dec. 572; *Shepard v. King*, 96 Ga. 81, 23 S. E. 113. Other cases turn on the question whether there was such a retention of possession by the seller as to render the sale fraudulent as against creditors, without involving the question of delivery, pure and simple. *Wilkes v. Ferris*, 5 Johns. (N. Y.) 336, 4 Am. Dec. 364; *Barr v. Reitz*, 53 Pa. 256; *Benford v. Schell*, 55 Pa. 393; *Adams v. Foley*, 4 Iowa, 44; *Puckett v. Reed*, 31 Ark. 131. This seems to be the explanation of *Gibson v. Stevens*, 8 How. (U. S.) 384, 12 L. Ed. 1123, in which the title of the transferee of a warehouse receipt (not undertaking to deliver to the order of the bailor) was sustained as against an attaching creditor of the bailor, although the court says that the transfer “passed the title and possession.” See *Hallgarten v. Oldham*, supra, per Holmes, J., commenting on this case.

²⁸ *Benj. Sales*, § 697; post, pp. 274, 320. Cf. *Sales Act*, § 43 (3).

²⁹ See *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Allen v. Maury*, 66 Ala. 10; *Merchants' Bank of Detroit v. Hibbard*, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; *First Nat. Bank v. Bates* (D. C.) 1 Fed. 702; *Gill v. Frank*, 12 Or. 507, 8 Pac. 764, 53 Am. Rep. 378.

that he is bound to do by leaving or placing the goods at the buyer's disposal, so that he may remove them without lawful obstruction.²⁰

Goods in Possession of Third Person.

If the goods are on the premises of a third person, the seller must obtain the license of such person for the buyer to come and remove the goods, and, if the goods are in the custody of such person as bailee, his attornment to the buyer.²¹ Such license or attornment, it seems, may be given in advance. Thus, where the defendant sold at auction a rick of hay on the premises of J., who had given a license to remove it, and the license was read at the auction, and the defendant gave the buyer a note to J., requesting him to permit the buyer to remove the hay, it was held that, although permission was refused, the delivery was complete.²²

If the goods are not in the custody of any person, as timber lying at the disposal of the seller on the premises of the person from whom he bought it, or at a public wharf, or logs floating in a river, delivery may be made by word or act, putting the goods at the disposal of the buyer and suffering him to assume the same position of control which the seller had.²³

²⁰ Wood v. Tassell, 6 Q. B. 234; Smith v. Chance, 2 Barn. & Ald. 753; Middlesex Co. v. Osgood, 4 Gray (Mass.) 447; Phelps v. Hubbard, 51 Vt. 489; Smith v. Gillett, 50 Ill. 290; Dakota Stock & Grazing Co. v. Price, 22 Neb. 96, 84 N. W. 97 (sale of ranch and cattle on range); Hillestad v. Hostetter, 46 Minn. 393, 49 N. W. 192.

²¹ Smith v. Chance, 2 Barn. & Ald. 753.

²² Salter v. Woollams, 2 Man. & G. 650. See, also, Wood v. Manley, 11 Adol. & E. 34.

²³ Snow v. Terrett, 167 Mass. 457, 45 N. E. 764; Avery Mfg. Co. v. Emsweller, 31 Ind. App. 291, 67 N. E. 946.

"In all cases the essence of delivery is that the deliverer by some apt and manifest acts puts the deliverer in the same position of control over the thing, either directly or through a custodian, which he himself held immediately before that act." Pollock, Possession, 43, 46.

See Leonard v. Davis, 1 Black (U. S.) 476, 17 L. Ed. 222; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Boynton v. Veazle, 24 Me. 286; Hutchins v. Gilchrist, 23 Vt. 82; Kingsley v. White, 57 Vt. 565. Ante, p. 97.

Place of Delivery.

Where the contract does not otherwise provide,⁸⁴ the place of delivery is the seller's place of business, or, if he have no place of business, his residence.⁸⁵ If the goods are to be grown or manufactured, the place of delivery is the farm or factory.⁸⁶ "The store of the merchant, the shop of the mechanic, and the farm or granary of the farmer, at which the articles sold are deposited or kept, must be the place where demand and delivery are to be made, when the contract is to buy upon demand, and is silent as to the place."⁸⁷ A distinction is made, however, in some of the cases where, though the place is not fixed, the seller is bound to deliver on or before a certain day, and it is held that under such a contract the seller must seek the buyer, and tender the goods, or, if they are cumbersome, ask him within a reasonable time before delivery to appoint a place.⁸⁸ These cases proceed on the analogy of certain cases which hold that, in contracts for the payment of a debt in goods, if the goods are deliverable on demand the creditor must be the actor, but that if they are deliverable at or within a certain time the debtor must be the actor; but it seems that even where the time, and not the place, is fixed, the better rule is that passive readiness to allow the buyer to take the goods is all that is required of the seller.⁸⁹

⁸⁴ See *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. Ed. 554; *Van Valkenburg v. Gregg*, 45 Neb. 654, 63 N. W. 949.

⁸⁵ *Sousely v. Burns' Adm'r*, 10 Bush (Ky.) 87; *Janney v. Sleeper*, 30 Minn. 473, 16 N. W. 365; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Rice v. Churchill*, 2 Denio (N. Y.) 145. Cf. *Mobile Fruit & Trading Co. v. McGuire*, 81 Minn. 232, 83 N. W. 833.

Under a Code providing that, when a contract for the payment or delivery of property other than money does not fix a place of payment, the maker may tender it at the place where the payee resides, when a contract for the sale of cattle fails to specify the place of delivery, it is at the residence of the buyer. *Holtz v. Peterson*, 98 Iowa, 741, 62 N. W. 19.

⁸⁶ *Middlesex Co. v. Osgood*, 4 Gray (Mass.) 447; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Hamilton v. Calhoun*, 2 Watts (Pa.) 139; *Bragg v. Beers*, 71 Ala. 151; *Bliss Co. v. Light Co.*, 149 N. Y. 300, 43 N. E. 859.

⁸⁷ 2 Kent, Comm. 505.

⁸⁸ *Barr v. Myers*, 3 Watts & S. (Pa.) 295; *Allen v. Woods*, 24 Pa. 76. Cf. *Hapgood v. Shaw*, 105 Mass. 276.

⁸⁹ 2 Kent, Comm. 506; *Benj. Sales*, § 682.

If the contract is for the sale of specific goods the place of delivery, in the absence of express agreement, is fixed by the situation of the goods at the time of the contract, at least if the situation is known to the parties.⁴⁰

The seller may be bound, however, either expressly or by implication, to notify the buyer of the place of delivery or of the readiness of the goods, in which case the buyer is not in default until after he has received notice. Thus, in a contract for the sale of goods "ex quay or warehouse," there is an implied condition that the seller shall give notice of the place of storage.⁴¹

On the other hand, the buyer may be bound to notify the seller of the place of delivery before the seller can be called on to deliver. Thus, if the agreement is to deliver on board the buyer's ship, the buyer must name the ship, and give notice of his readiness to receive the goods, before he can complain of the nondelivery.⁴² So, where the buyer is to provide cars, he must notify the seller, before the latter can be put in default.⁴³

⁴⁰ *Gray v. Walton*, 107 N. Y. 254, 14 N. E. 191; *Smith v. Gillett*, 50 Ill. 290. The qualification as to the knowledge of the parties is found in English Sale of Goods Act, § 29 (1). See also Sales Act, § 43 (1). It would seem, however, that, on general principles, if the goods were at a place other than the seller's residence or place of business, the parties would not be presumed to contract with reference to such place, unless it appeared that the situation of the goods was known to them. Delivery to a carrier at the place where the goods are at the time of sale is delivery under a contract silent as to the place of delivery. *Perlman v. Sartorius*, 162 Pa. 320, 29 Atl. 852, 42 Am. St. Rep. 834.

⁴¹ *Davies v. McLean*, 21 Wkly. Rep. 264, 28 Law T. (N. S.) 113.

⁴² *Armitage v. Insole*, 14 Q. B. 728; *Walton v. Black*, 5 Houst. (Del.) 149. But, if the time or place is at the seller's option, he must give notice thereof before the buyer is under any obligation to name the ship. *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32.

⁴³ *Kunkle v. Mitchell*, 56 Pa. 100; *Hocking v. Hamilton*, 158 Pa. 107, 115, 27 Atl. 836; *Bolton v. Riddle*, 35 Mich. 13. But see *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104, where the seller was to deliver railroad ties on cars to be furnished by the buyer, and it was held that the seller must haul the ties to the station, and, if no cars were ready to receive them, deposit them near the track, the usual place of receiving such property, before he could show performance. On the other hand, in *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698, it was held that the seller, not having been notified, need not haul

Where the buyer is bound to designate the place, but fails to do so, it is enough to constitute performance by the seller if he has the goods ready at the time fixed by the contract.⁴⁴

Time of Delivery—Reasonable Time.

Where the seller is bound to send the goods, but the contract is silent as to the time, he is allowed a reasonable time.⁴⁵ If he delays unreasonably, the buyer is relieved of his obligation to receive delivery.⁴⁶ What is a reasonable time is a question of fact in view of all the circumstances attending the sale.⁴⁷ If the contract is in writing, parol evidence of the facts and circumstances attending the sale is admissible in order to determine what is reasonable time.⁴⁸ Where the contract expresses the time, the question is one of construction, and therefore for the court. When the seller is to deliver at a designated place, but the time is not fixed, the seller must notify the buyer of his readiness to deliver;⁴⁹ but, if the buyer is to designate the

machinery to the station, as he would not be justified in leaving it by the wayside.

⁴⁴ Lucas v. Nichols, 5 Gray (Mass.) 311; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Lockhart v. Bonsall, 77 Pa. 53; Boyd v. Gunnison, 14 W. Va. 1; Well v. Metal Co., 182 Ill. 128, 54 N. E. 1050. Where the seller was to deliver a ship at Portland, and the buyer after notice failed to designate a wharf or other place, tender of delivery at a safe and usual anchorage in the harbor was sufficient. Lincoln v. Gallagher, 79 Me. 189, 8 Atl. 883.

⁴⁵ McHenry v. Bullfant, 207 Pa. 15, 56 Atl. 226.

⁴⁶ Ellis v. Thompson, 8 Mees. & W. 445; Blydenburgh v. Welsh, Baldw. (U. S.) 331, Fed. Cas. No. 1,583; Pope v. Manufacturing Co., 107 N. Y. 61, 13 N. E. 592; Boyd v. Gunnison, 14 W. Va. 1; Grant v. Bank, 35 Mich. 515; Tufts v. McClure, 40 Iowa, 317; McGinnis v. Johnson Co. (Neb.) 104 N. W. 869.

⁴⁷ Ellis v. Thompson, 8 Mees. & W. 445; Pinney v. Railroad Co., 19 Minn. 251 (Gil. 211); Stange v. Wilson, 17 Mich. 342; Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183. Contra, Echols v. Railroad Co., 52 Miss. 610; Bagby v. Walker, 78 Md. 239, 27 Atl. 1033; Fisher v. Boynton, 87 Me. 395, 32 Atl. 995; Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811.

⁴⁸ Ellis v. Thompson, 8 Mees. & W. 445. But where the contract is in writing, and does not state the time, evidence of a contemporaneous parol agreement fixing the time is inadmissible. Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183.

⁴⁹ Cullum v. Wagstaff, 48 Pa. 300.

time, the seller cannot be put in default until it has been designated.⁵⁰

Where the seller is not bound to send the goods, it would seem that the buyer has a reasonable time to come and fetch them.⁵¹ But when the delivery is to be on demand, or as required, the buyer is not in default until after the seller has called on him to accept delivery.⁵² If the goods are to be manufactured, it seems that before the buyer can be put in default the seller must notify him that the goods are ready.⁵³

When Time is Fixed.

"In determining whether stipulations as to time of performance of a contract of sale are conditions precedent, the court simply seeks to discover what the parties really intended, and if time appears, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent."⁵⁴ In mercantile transactions, however, such as the sale of goods, when the time for performance is fixed by the contract, time is generally held to be of the essence of the contract, at least so far as concerns the time of delivery. Where one of the terms of the contract provides for the time of shipment or delivery, shipment or delivery at the time fixed will usually be held as a condition precedent.⁵⁵ "In the contracts of merchants," said Mr. Justice Gray,⁵⁶ "time is of the essence. The time of shipment is the usual and convenient means of fixing

⁵⁰ Posey v. Scales, 55 Ind. 282; Louisville, N. A. & C. Ry. Co. v. Iron Co., 126 Ill. 294, 18 N. E. 735. And see Kingman & Co. v. Wagon Co., 176 Ill. 545, 52 N. E. 328.

⁵¹ Mowry v. Kirk, 19 Ohio St. 375.

⁵² Jones v. Gibbons, 8 Exch. 920; Cameron v. Wells, 30 Vt. 633.

⁵³ Where the seller was to build a vessel, and deliver it at one of several places to be designated by the buyer, it was the seller's duty to give notice when it was finished, so that the buyer might designate the place. Spooner v. Baxter, 16 Pick. (Mass.) 409.

⁵⁴ Benj. Sales, § 593, cited with approval by Folger, J., in Higgins v. Railroad Co., 60 N. Y., at page 557.

⁵⁵ Ellinger v. Comstock, 13 Ind. App. 699, 41 N. E. 351; Lefferts v. Weld, 167 Mass. 531, 46 N. E. 107. See, also, Redlands Orange-Growers' Ass'n v. Gorman, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718. Cf. Coyne v. Avery, 189 Ill. 378, 59 N. E. 788; post, p. 287.

⁵⁶ Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 360.

the probable time of arrival, with a view to providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as * * * a condition precedent, on the failure of which the party aggrieved may repudiate the whole contract." In this country, stipulations as to the time of payment, also, are generally, although not uniformly, regarded as of the essence of the contract.⁵⁷ A different rule has prevailed in England,⁵⁸ where the Sale of Goods Act now provides that, "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale."⁵⁹

Although at common law "month" generally means "lunar month," in mercantile contracts it is construed as meaning "calendar month."⁶⁰ When a certain number of days is allowed for delivery, they are counted as consecutive days, and include Sundays,⁶¹ though if the last day falls on Sunday it is not generally counted.⁶² The day of the contract is not included in counting the number of days.⁶³

When the time and place are fixed, a delivery at such time and place is good though the buyer be absent.⁶⁴

Hour of Delivery.

A tender of delivery on the last day at the place designated is good, even in the absence of the buyer, provided it be made

⁵⁷ See cases cited note 112, *infra*.

⁵⁸ *Martindale v. Smith*, 1 Q. B. 389, 395; *Meorsey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, 444.

⁵⁹ Section 10 (1).

⁶⁰ *Webb v. Fairmaner*, 3 Mees. & W. 473; *Churchill v. Merchants' Bank*, 19 Pick. (Mass.) 532; *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 179. This is sometimes regulated by statute.

⁶¹ *Brown v. Johnson*, 10 Mees. & W. 331. See, also, cases cited in note 62.

⁶² *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; *Sands v. Lyon*, 18 Conn. 18; *Barrett v. Allen*, 10 Ohio, 426.

⁶³ *Webb v. Fairmaner*, 3 Mees. & W. 473; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

⁶⁴ *Barton v. McKelway*, 22 N. J. Law, 165; *Case v. Green*, 5 Watts (Pa.) 262, 30 Am. Dec. 311.

within such time before sunset that the delivery can be completed by daylight.⁶⁶ A tender at a later hour is good if the buyer be found at the designated place, or in cases where delivery may be made to the buyer wherever he happens to be, provided the delivery can be completed before midnight;⁶⁶ though even in the latter case, if daylight is necessary to enable the buyer to make a proper inspection, it seems that the delivery must be made in time to enable him to make such examination by daylight.⁶⁷

But, where the time and place of delivery are fixed, it has been held that the mere transportation of the goods to that place is not a sufficient delivery, without the presence of the seller or his agent to make delivery and receive the price.⁶⁸ The English Sale of Goods Act provides that "what is a reasonable hour is a question of fact."⁶⁹

Expenses of Putting into Deliverable State.

The English Sale of Goods Act provides: "Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."⁷⁰ This provision is said by Judge Chalmers to be declaratory of the law.⁷¹

⁶⁶ *Startup v. Macdonald*, 6 Man. & G. 593, 624, per Parke, B.

⁶⁶ *Startup v. Macdonald*, 6 Man. & G. 593; *Berry v. Nall*, 54 Ala. 446.

⁶⁷ *Croninger v. Crocker*, 62 N. Y. 151, 158.

⁶⁸ *Catlin v. Jones* (Or.) 85 Pac. 515.

⁶⁹ Section 29 (4), followed in Sales Act, § 43 (4). Judge Chalmers observes: "This subsection alters the law in so far as it makes what is a reasonable hour a question of fact. It was formerly a question of law, and some highly technical rules for determining it were laid down by Lord Wenslerdale" (in *Startup v. Macdonald*, supra). Chalm. Sale of Goods Act (6th Ed.) 72.

⁷⁰ Section 29 (5). Followed in Sales Act, § 43 (5).

⁷¹ Chalmers, Sale of Goods Act (6th Ed.) p. 72, citing Story, Sales, § 297a. Cf. Benj. Sales (5th Eng. Ed.) 694. See *Playford v. Mercer*, 22 Law T. 41; *Cole v. Kerr*, 20 Vt. 21.

DELIVERY OF WRONG QUANTITY.

86. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract, and reject the rest, or [if he cannot separate the goods included in the contract from the other goods without incurring trouble or expense] he may reject the whole. If he accepts the whole, he must pay for them at the contract rate.⁷²
87. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract, and reject the rest, or, he may reject the whole.⁷³
88. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them; but, if the buyer accepts them, it is generally held that he must pay for them, though some courts hold that he need not pay for them unless he has otherwise waived his right to a performance of the whole contract.⁷⁴

Delivery of Too Much.

The seller does not comply with his contract by a tender or delivery of a greater quantity than the contract requires. Thus it was held that, where the contract called for 200 bales, an allegation that the seller shipped 206 bales and that the buyer refused to receive the same or any part thereof was bad, for want of an allegation that the seller was ready to deliver 200 only.⁷⁵ And where the order was for 2 dozen wine, and 4 dozen were sent, it was held that the buyer might return the whole.⁷⁶ So where the order was for 10 hogsheads of claret,

⁷² See Sale of Goods Act, § 30 (2); Sales Act, § 44 (2). Cf. Sale of Goods Act, § 30 (4); Sales Act, § 44 (4).

The qualification introduced by the words included in brackets applies only in certain jurisdictions. See post, p. 282.

⁷³ Sale of Goods Act, § 30 (3); Sales Act, § 44 (3).

⁷⁴ See Sale of Goods Act, § 30 (1); Sales Act, § 44 (1).

⁷⁵ Dixon v. Fletcher, 3 Mees. & W. 146.

⁷⁶ Hart v. Mills, 15 Mees. & W. 85.

and the seller sent 15, it was held that the contract was not performed; the court saying that the buyer cannot tell which are the 10 that are to be his, and that it is no answer to the objection to say that he may choose which 10 he likes, for that would be to force a new contract upon him.⁷⁷

In this country, while the buyer is, as a general rule, entitled to refuse the whole, if the quantity tendered exceeds the quantity specified,⁷⁸ some cases hold that, if no additional trouble or expense is cast upon the buyer by the selection or separation, the delivery of a greater amount, with the request to select or separate from the mass the amount required, is sufficient.⁷⁹ Thus where the contract was for 5,000 barrels of oil to be delivered in cars in bulk, but it was not the seller's duty to pump the oil from the cars, it was held that a tender of 5,891 barrels in bulk from which the buyer could take the required amount was good.⁸⁰

If a greater amount is sent in performance of the contract, and not for the purpose of charging the buyer with the excess, the delivery may be good.⁸¹ If a greater amount is tendered for the purpose of charging the buyer with the excess, and he accepts the whole, he must pay for the excess at the contract rate, such a delivery operating as a proposal for a new con-

⁷⁷ *Cunliffe v. Harrison*, 6 Exch. 903.

⁷⁸ *Rommel v. Wingate*, 103 Mass. 327; *Stevenson v. Burgin*, 49 Pa. 86; *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 29 L. Ed. 866, per Gray, J.; *Perry v. Iron Co.*, 16 R. I. 318, 15 Atl. 87; *Clark v. Baker*, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; *Croninger v. Crocker*, 62 N. Y. 151; *Hoffman v. Kling*, 58 Wis. 314, 17 N. W. 136 (lumber must be so assorted and separated from lumber of other dimensions or of inferior quality as to be capable of identification); *Kalamazoo Corset Co. v. Simon* (C. C.) 129 Fed. 144. See ante, p. 150.

⁷⁹ *Lockhart v. Bonsall*, 77 Pa. 53; *Brownfield v. Johnson*, 128 Pa. 254, 268, 18 Atl. 543, 6 L. R. A. 48; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86, 3 N. W. 269 (deposit of greater amount of ore from which buyer could take contract quantity); *Ganson v. Madigan*, 9 Wis. 146; *Id.*, 13 Wis. 67. See, also, *Croninger v. Crocker*, 62 N. Y. 151.

⁸⁰ *Lockhart v. Bonsall*, 77 Pa. 53.

⁸¹ *Downer v. Thompson*, 6 Hill (N. Y.) 208. Cf. *Williamson v. Lumber Co.*, 42 Or. 153, 70 Pac. 387, 532.

tract,⁸² but it seems that he may accept the part contracted for and reject the residue.⁸³

Delivery of Goods Mixed with Other Goods.

If the goods ordered are sent mixed with other goods, the same principles govern. Where Ruabon coals were ordered, and a certain quantity of Ruabon coals were shot into a heap with coals of a different sort, the delivery was held bad.⁸⁴ And where crockery was sent packed in a crate with other crockery, although the crockery ordered was perfectly distinguishable, the same rule was applied, upon the ground that the seller had no right to impose on the buyer the onus of unpacking and separating.⁸⁵ The rule applies where damaged goods or goods of an inferior quality are mixed with the bulk.⁸⁶

Delivery of Too Little.

It is universally conceded that the buyer need not accept less than the entire quantity of the goods contracted for, and that if the seller delivers a smaller quantity the buyer may reject them.⁸⁷ But it is held in most jurisdictions that, if the buyer accepts a partial delivery, he must pay for the goods accepted,

⁸² *Cunliffe v. Harrison*, 6 Exch. 903, 906, per Parke, B. See, also, *Levino v. Moore Co.*, 97 App. Div. 109, 89 N. Y. Supp. 573.

⁸³ *Sale of Goods Act*, § 30 (2); *Sales Act*, § 44 (2); *Larkin v. Lumber Co.*, 42 Mich. 296, 3 N. W. 904. But see *Ormond v. Henderson*, 77 Miss. 84, 24 South. 170.

⁸⁴ *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620, 35 Law J. Q. B. 176.

⁸⁵ *Levy v. Green*, 8 El. & Bl. 575, 27 Law J. Q. B. 111, 28 Law J. Q. B. 319.

⁸⁶ *Clark v. Baker*, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; *Hoffman v. King*, 58 Wis. 314, 17 N. W. 136. See, also, *Walker v. Davis*, 65 N. H. 170, 172, 18 Atl. 196.

⁸⁷ *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701; *Rockford, R. I. & St. L. R. Co. v. Lent*, 63 Ill. 288; *Smith v. Lewis*, 40 Ind. 98; *Hill v. Heller*, 27 Hun (N. Y.) 416; *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485; *Price v. Engelke*, 68 N. J. Law, 567, 53 Atl. 698; *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487. See, also, cases cited in note 88.

"Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments." *Sale of Goods Act*, § 31 (1); *Sales Act*, § 45 (1). See *Reuter v. Sala*, 4 O. P. Div. 239; ante, p. 57.

although the seller fails to deliver the rest of the goods.⁸⁸ The seller may not sue for the price of the portion of the goods delivered before the time fixed for the delivery of the rest,⁸⁹ but after the expiration of such time he may sue.⁹⁰ In such case, however, the buyer may reduce the amount of the seller's recovery by way of recoupment, by showing that he has sustained damages by the seller's failure fully to perform the contract.⁹¹

Some courts, however, deny the seller's right to recover for a partial delivery. This was held in an early case⁹² in New York, in which the contract was for 100 tons of hay, to be delivered between certain dates, and to be paid for at a certain price per ton, part in advance, and the residue when the whole

⁸⁸ *Shipton v. Casson*, 5 Barn. & C. 378, 382, per Lord Tenterden; *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Morgan v. Gath*, 8 Hurl. & C. 748, 34 Law J. Exch. 165; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Hedden v. Roberts*, 134 Mass. 40, 45 Am. Rep. 276; *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63, 21 Am. Dec. 410; *Clark v. Moore*, 3 Mich. 55; *Booth v. Tyson*, 15 Vt. 515; *Richards v. Shaw*, 67 Ill. 222; *Polhemus v. Helman*, 45 Cal. 578; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. 611; *Saunders v. Short*, 86 Fed. 225, 30 C. C. A. 462; *Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, 122 Fed. 414, 58 C. C. A. 648; *Briggs v. Morgan*, 104 Mo. App. 62, 78 S. W. 295; *Gibbony v. R. W. Wayne Co.*, 141 Ala. 300, 37 South. 426; *Mead v. Rat Portage Lumber Co.*, 93 Minn. 343, 101 N. W. 299. "He must pay for them at the contract rate." Sale of Goods Act, § 30 (1). Cf. Sales Act, § 44 (1). See *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814. The price agreed, in the absence of other evidence, may be taken as the basis for apportioning the seller's damages. *Churchill v. Holton*, supra.

⁸⁹ *Waddington v. Oliver*, 2 Bos. & P. (N. R.) 61.

⁹⁰ *Colonial Ins. Co. v. Adelaide M. Ins. Co.*, 12 App. Cas. 128, at page 138. "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fails to complete the contract, return the part delivered. But, if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods, which he has so delivered." *Oxendale v. Wetherell*, 9 Barn. & C. 386, per Parke, J.

⁹¹ *Bowker v. Hoyt*, 18 Pick. 555; *Richards v. Shaw*, 67 Ill. 222.

⁹² *Champlin v. Rowley*, 18 Wend. (N. Y.) 187; *Id.*, 13 Wend. (N. Y.) 258.

should be delivered. The seller delivered only 52 tons, and after the expiration of the time fixed for the delivery of the whole brought action to recover for the quantity delivered at the stipulated price, but it was held that there could be no recovery, the buyer not having waived or prevented a full performance. This case has been followed in New York and in some other jurisdictions.⁹³ A limitation of the doctrine enunciated in that case has, however, been introduced in a later New York case,⁹⁴ in which the contract was for the delivery of 699 boxes of glass at one time, and the buyer accepted the delivery of a part, without knowledge that the rest was not to be delivered, but without any reservation. It was held that the seller could recover for the glass delivered. The case was distinguished on the ground that in the earlier case, the hay being deliverable in parcels, the buyer could not reject a partial delivery, and hence there was no waiver of the condition that the whole must be delivered; but that in the case at bar, the delivery of the whole being required to be made at one time, the buyer could decline to receive a partial delivery, and that consequently acceptance of a partial delivery operated as a waiver of the condition.

"More or Less"—"About."

When the contract states the amount to be delivered with the qualification of the words "more or less," "about," or words of similar import, the seller is allowed a certain latitude in respect to the quantity. The following rules have been laid down by the supreme court of the United States:⁹⁵ (1). When the goods are identified by reference to independent circumstances, such as an entire lot in a certain warehouse, or all that may be manufactured in a certain establishment, or that may be shipped in a certain vessel, and the quantity is named with such words of qualification, the contract applies to the specific

⁹³ *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183; *Kein v. Tupper*, 52 N. Y. 550; *Nightingale v. Elsemann*, 121 N. Y. 288, 24 N. E. 475. *Haslack v. Mayers*, 26 N. J. Law, 284; *Witherow v. Witherow*, 16 Ohio, 238. See *Holden Steam Mill v. Westervelt*, 67 Me. 446.

⁹⁴ *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; See *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. 611.

⁹⁵ *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622.

lot, and the naming of the quantity is not regarded as a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required by the party making it.⁹⁶ (2) Where no such independent circumstances are referred to, and the agreement is to furnish goods to a certain amount, the quantity specified is material, and governs the amount; and the words of qualification are only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies.⁹⁷ (3) In the last case, however, if the words of qualification are supplemented by other stipulations or conditions which give them a broader scope, or more extensive significance, the contract is governed by such added stipulations or conditions. The case in which these rules were stated fell under the last rule.⁹⁸ The contract was with the government for 880 cords of wood, "more or less," as should be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the garrison of a certain post for one year, and the post commander at once notified the seller that only 40 cords would be required, and it was held that the government was liable for only 40 cords.

⁹⁶ *McConnel v. Murphy*, L. R. 5 P. C. 203; *McLay v. Perry*, 44 Law T. (N. S.) 152; *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589; *Navassa Guano Co. v. Guano Co.*, 93 Ga. 92, 18 N. E. 1000; *Morris v. Wilboux*, 159 Ill. 627, 43 N. E. 887.

⁹⁷ *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Creighton v. Comstock*, 27 Ohio St. 548; *Olapp v. Thayer*, 112 Mass. 296; *Cockerell v. Aucompte*, 28 Law J. C. P. 194; *United States v. Pine River L. & I. Co.*, 89 Fed. 907, 32 C. C. A. 406.

The delivery and receipt of 4,634 tons of coal, under a contract for the delivery and acceptance of "about 5,000 tons," does not so complete the contract as to entitle the vendee for that reason to refuse a tender of the remaining 366 tons. *Moore v. United States*, 196 U. S. 157, 25 Sup. Ct. 202, 49 L. Ed. 428.

⁹⁸ *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622; See, also, *Callmeyer v. Mayor, etc.*, 83 N. Y. 116; *Tancred v. Steel Co.*, 15 App. Ct. 125.

DELIVERY BY INSTALLMENTS.

89. Where there is a contract for the sale of goods to be delivered in installments, which are to be separately paid for, and the seller makes defective deliveries in respect to one or more installments, or the buyer neglects or refuses to take delivery or to pay for one or more installments, the authorities differ.

- (a) According to the more recent English decisions and to some decisions in this country, it is a question, in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.⁹⁹
- (b) According to the weight of authority in the United States, a material breach in respect to the delivery of any installment, or in respect to taking delivery or paying for any installment, gives the other party a right to repudiate the whole contract.¹⁰⁰

Rule in England.

It is impossible to reconcile the English decisions on this subject,¹⁰¹ some of which have held that the refusal to deliver or to accept a particular installment is a breach going to the root of the contract,¹⁰² and others of which have held the contrary.¹⁰³ The leading case in the affirmative is *Hoare v. Ren-*

⁹⁹ Sale of Goods Act, § 31 (2). See *Benj. Sales* (5th Eng. Ed.) 723.

¹⁰⁰ Sales Act, § 45 (2), provides: "It depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." Prof. Williston says that this is in accord with the weight of American authority, citing *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; 14 Harv. L. Rev. 823.

¹⁰¹ *Benj. Sales*, §§ 593, 593a; *Chalm. Sale of Goods Act* (6th Ed.) p. 74.

¹⁰² *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Hoare v. Rennie*, 5 Hurl. & N. 19, 29 Law J. Exch. 73; *Honck v. Muller*, 7 Q. B. Div. 92.

¹⁰³ *Jonassohn v. Young*, 4 Best & S. 296, 32 Law J. Q. B. 385;

nie.¹⁰⁴ In that case the defendant agreed to buy from the plaintiff 667 tons of iron, to be shipped from Sweden in about equal portions in each of the months of June, July, August, and September, and the plaintiff shipped only 20 tons in June, which the defendant refused to accept. It was held that delivery at the time specified was a condition precedent, and that the plaintiff could not maintain an action against the defendant for not accepting. The leading case in the negative is *Simpson v. Crippin*.¹⁰⁵ In that case the defendant had agreed to supply the plaintiff with 6,000 or 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery in equal monthly quantities during the period of 12 months from July 1st. During July the plaintiff sent wagons for 158 tons only, and on the 1st of August the defendant wrote that the contract was canceled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. It was held, in an action on the defendant's refusal to go on with the contract, that the breach in failing to send wagons in sufficient numbers in the first month, though a ground for compensation, did not justify the defendant in rescinding the contract. The rule has been finally settled in England as above stated by *Mersey Steel & Iron Co. v. Naylor*,¹⁰⁶ in which the point decided was that failure of the buyer to pay for the first installment upon delivery, unless the circumstances evince an intention on his part to be bound no longer by the contract, does not entitle the seller to rescind.

Rule in the United States.

In this country the same conflict of authority has existed, some cases substantially following *Hoare v. Rennie*,¹⁰⁷ and

Simpson v. Crippin, L. R. 8 Q. B. 14; *Freeth v. Burr*, L. R. 9 Q. B. 208.

¹⁰⁴ 5 Hurl. & N. 19, 29 Law J. Exch. 73.

¹⁰⁵ L. R. 8 Q. B. 14.

¹⁰⁶ 9 App. Cas. 434, affirming 9 Q. B. Div. 648.

¹⁰⁷ *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Clark v. Wheeling Steel Works*, 3 C. C. A. 600, 53 Fed. 494; *Peace River Phosphate Co. v. Grafflin* (C. C.) 58 Fed. 550; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Rugg v. Moore*, 110 Pa.

others *Simpson v. Crippin*.¹⁰⁸ The case of *Norrington v. Wright*,¹⁰⁹ in the Supreme Court of the United States, however, has gone far to establish the rule in this country in conformity with the first of these cases. In *Norrington v. Wright* the contract was for the sale of "5,000 tons of iron rails, for shipment from European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August, 1880, at \$45 per ton, ex ship Philadelphia, settlement cash on presentation of bills," etc. It was held that the seller was bound to ship 1,000 tons in each month, and that only 400 tons having been shipped in February, and 885 tons in March, the buyer, although he had paid for the February shipment in ignorance of the defective shipments in that month and in March, had the right to rescind the whole contract for the defective deliveries in respect to the first installments. The decision rests on the ground that in contracts of merchants time is of the essence, and that the shipment at the time specified in the contract was a condition precedent, on failure of which the buyer might rescind the whole contract. The court reviews the later English cases, and prefers the doctrine of *Hoare v. Rennie* to that of *Simpson v. Crippin*, both on principle and authority. It is to be noted that Gray, J., in commenting on *Mersey Steel & Iron Co. v. Naylor*, distinguishes the case, pointing out that the ground of

236, 1 Atl. 320; *Reybold v. Voorbees*, 30 Pa. 116; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Providence Coal Co. v. Coxe*, 19 R. I. 380, 582, 35 Atl. 210; *Creswell Ranch & C. Co. v. Martindale*, 63 Fed. 84, 11 C. C. A. 33. See, also, *Dwinel v. Howard*, 30 Me. 258; *Walton v. Black*, 5 Houst. (Del.) 149; *Bradley v. King*, 44 Ill. 339; *Stokes v. Baars*, 18 Fla. 656; *Higgins v. Delaware, L. & W. R. Co.*, 60 N. Y. 553.

¹⁰⁸ *Bollman v. Burt*, 61 Md. 415; *Blackburn v. Relly*, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159; *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Hansen v. Consumers' Steam-Heating Co.*, 73 Iowa, 77, 34 N. W. 495; *Gerli v. Manufacturing Co.*, 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; *Mayor v. Schaub Bros.*, 96 Md. 534, 54 Atl. 106. And see *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. See, also, an article by Mr. Landreth, 21 Am. Law Reg. 398, in which he concludes that the weight of American authority supports the English rule.

¹⁰⁹ 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

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the decision, as stated by the Lord Chancellor, are applicable only to the case of failure of the buyer to pay for, and not to failure of the seller to deliver, the first installment; that is, that, since delivery must precede payment, no particular payment can be a condition precedent to the entire contract, and hence payment cannot be a condition precedent to a subsequent fulfillment of the unfulfilled part, by delivery of the subsequent installments.¹¹⁰ In a later case¹¹¹ in the Supreme Court the same rule was applied where the first installment had been delivered and paid for, and the default consisted in failure to deliver the rest of the quantity within the time specified. It has been held, however, in numerous cases, that neglect or refusal to pay for an installment is such a default as gives the seller the right to repudiate the contract.¹¹²

DELIVERY TO CARRIER.

90. Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery to the buyer, except where the contract requires the seller to deliver

¹¹⁰ The English editor of Benjamin on Sales, commenting on *Norington v. Wright*, says that "this appears to be an entire misapprehension of the ratio decidendi of that case [*Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434] both in the House of Lords and in the Court of Appeal, which lies in the application of a general principle equally applicable whether the breach of contract is committed by one or other of the parties to the contract." *Benj. Sales* (Bennett's 7th Am. Ed.) § 593a.

¹¹¹ *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920.

¹¹² *Robson v. Rohn*, 27 Minn. 333, 7 N. W. 357 (cf. *Beatty v. Lumber Co.*, 77 Minn. 272, 79 N. W. 1013); *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *Hull Coal & C. Co. v. Coke Co.*, 113 Fed. 256, 51 C. C. A. 213; *George H. Hess Co. v. Dawson*, 149 Ill. 138, 36 N. E. 557. And see *Faber v. Houghtham*, 36 Or. 428, 59 Pac. 547, 1111; *National Machine & T. Co. v. Machine Co.*, 181 Mass. 275, 63 N. E. 900; *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419; *National Contracting Co. v. Cement Co.*, 192 Mass. 247, 78 N. E. 414.

Mere failure to pay, not evincing a purpose to renounce, held not

the goods to the buyer, or at a particular place, or unless a contrary intention appears.¹¹³

- 91. DUTY TO INSURE SAFE ARRIVAL.** Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.¹¹⁴

As we have already seen,¹¹⁵ when the seller is bound to send the goods to the buyer, a delivery to a common carrier is delivery to the buyer himself, the carrier becoming the bailee of the person to whom the goods are sent.¹¹⁶ If, however, the seller is bound to deliver at the buyer's residence or at a distant place, the carrier is the seller's bailee for the purpose of

to justify the seller in treating the contract as abandoned. *Monarch Cycle Mfg. Co. v. Wheel Co.*, 105 Fed. 824, 44 C. C. A. 523; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 60, 51 L. R. A. 791.

¹¹³ See Sales Act, § 46 (1).

¹¹⁴ Sale of Goods Act, § 32 (2), followed in Sales Act, § 46 (1), which is said to be declaratory of the common law. *Benj. Sales* (5th Eng. Ed.) 739.

¹¹⁵ *Ante*, pp. 94, 155.

¹¹⁶ *Walt v. Baker*, 2 Exch. 1; *Dunlop v. Lambert*, 6 Clark & F. 600; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Strong v. Dodds*, 47 Vt. 348; *Stafford v. Walter*, 67 Ill. 83; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Sarbeck v. State*, 65 Wis. 171, 28 N. W. 541, 56 Am. Rep. 624; *Kelsea v. Manufacturing Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794; *Mann v. Glauber*, 96 Ga. 795, 22 S. E. 405; *McKee v. Bainter*, 52 Neb. 604, 72 N. W. 1044; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374, 50 N. E. 1022; *McCullough Bros. v. Armstrong*, 118 Ga. 424, 45 S. E. 379.

Cars of coal which were loaded by the seller at the mines and billed to the buyer in the seller's shipping orders to the railroad company in compliance with the contract, but which the company appropriated to its own use under a plea of necessity, are to be considered, as between the parties, as having been delivered to the buyer in pursuance of the contract. *Luhrig Coal Co. v. Jones & Adams Co.*, 141 Fed. 617, 72 C. C. A. 311. But though the carrier is the buyer's agent to receive, he is not his agent to accept. *Ante*. p. 89.

carriage, and delivery to the carrier is not delivery to the buyer.¹¹⁷ And, although the seller may be authorized to deliver to a carrier, he may reserve the right of possession or property, and, if he does so, delivery to the carrier is not delivery to the buyer.¹¹⁸ If the buyer designates a particular carrier or a particular route, delivery to a different carrier or to a carrier for shipment by a different route is not delivery to the buyer.¹¹⁹

Duty to Insure Safe Arrival.

"Delivery of goods to a carrier or wharfinger, with due care and diligence, is sufficient to charge the purchaser, but he has a right to require that in making the delivery due care and diligence shall be exercised by the seller."¹²⁰ The seller must use the usual precaution to insure delivery.¹²¹ Thus where the seller neglected to apprise the carrier that the value of the

¹¹⁷ *Dunlop v. Lambert*, 6 Clark & F. 600; *Thompson v. Railroad Co.*, 1 Bond (U. S.) 152, Fed. Cas. No. 13,950; *Blloyd v. Pollock*, 27 W. Va. 75; *Devine v. Edwards*, 101 Ill. 138; *Braddock Glass Co. v. Irwin*, 153 Pa. 440, 25 Atl. 490; *Herring-Marvin Co. v. Smith*, 43 Or. 315, 72 Pac. 704, 73 Pac. 340; ante, p. 156.

¹¹⁸ Ante, p. 162.

¹¹⁹ *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787; *Iasigi v. Rosenstein*, 65 Hun, 591, 20 N. Y. Supp. 491.

A contract for the sale of sugar described it as "shipping or to be shipped * * * per steamer E.," the price to be so much per pound "ex ship." There were also clauses, "Sea damaged, if any, to be taken at a fair allowance," and "No arrival, no sale." Held that, the sugar having been put on board the E., the purchaser's duty to receive it was not affected by the fact that during the voyage, owing to an accident to the vessel, part of the sugar was transferred to another vessel for transportation. *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616.

¹²⁰ *Buckman v. Levi*, 3 Camp. 414, per Lord Ellenborough.

In an action on an accepted draft on the consignment of a car load of fruit, it appeared that the consignor shipped the fruit during the cold season in a common box car, and the fruit was frozen in transit; that consignor could have shipped the fruit in a refrigerator car, so as to prevent freezing; and that consignee did not know the condition of the fruit when he accepted the draft. Held, that the consignor was negligent in so shipping the fruit, and could not recover its value. *Wilson v. Fruit Co.*, 11 Ind. App. 89, 38 N. E. 827.

¹²¹ *Clarke v. Hutchins*, 14 East, 475; *Ward v. Taylor*, 56 Ill. 494. Where the order was to ship by rail immediately, and the

goods exceeded £5, although the carriers had published, and it was notorious in the place of shipment, that they would not be responsible for a package above that value unless entered and paid for as such, and the package was lost, it was held, in an action for goods sold and delivered, that there had been no delivery.¹²² If the goods are misdirected by the seller, so as to prevent their receipt by the buyer, the delivery is bad.¹²³ But the buyer must take any risks of deterioration necessarily incident to the transit.¹²⁴

Duty to Insure.

As a rule the seller is not bound to insure.¹²⁵ But if the dealings of the parties show that the seller is bound under the contract to insure when requested, and he fails on request to insure, and the goods are lost, he cannot recover payment.¹²⁶ The English Sale of Goods Act provides: "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."¹²⁷

railroad company refused to transport without a release of liability, a delivery on these terms was good. *Stafford v. Walter*, 67 Ill. 83.

¹²² *Clarke v. Hutchins*, 14 East, 475.

¹²³ *Finn v. Clark*, 10 Allen (Mass.) 479; *Id.*, 12 Allen (Mass.) 522; *Garretson v. Selby*, 37 Iowa, 529, 18 Am. Rep. 14.

¹²⁴ *Bull v. Robinson*, 10 Exch. 342, 24 Law J. Exch. 165; *Leggat v. Brewing Co.*, 60 Ill. 158; *Mobile Fruit & Trading Co. v. McGuire*, 81 Minn. 232, 83 N. W. 833; *McHenry v. Bulfant*, 207 Pa. 15, 56 Atl. 226; *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891. See Sale of Goods Act, § 33. And see *ante*, p. 261.

¹²⁵ *Bartlett v. Jewett*, 98 Ind. 206.

¹²⁶ *New York Tartar Co. v. French*, 154 Pa. 278, 26 Atl. 425.

¹²⁷ Section 32 (3). The rule is borrowed from the Scotch law. *Chalm. Sale of Goods Act* (6th Ed.) 76; *Benj. Sales* (5th Eng. Ed.) 739. It is followed with modification in *Sales Act*, § 46 (3). Prof. Williston says it is probably in accord with business usage.

BUYER'S RIGHT TO EXAMINE GOODS.

- 92.** Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.¹²⁰
- 93.** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.¹²⁰

An offer of delivery, accompanied with refusal to permit examination, or without reasonable opportunity to inspect, is invalid.¹²⁰

The buyer is not deemed to have accepted until he has had a reasonable opportunity to inspect. He may, however, waive inspection.¹²¹ And if he fails to inspect within a reasonable

¹²⁰ Sale of Goods Act, § 34 (1); Sales Act, § 47 (1). See, also, Sale of Goods Act, § 15 (2) (b); Sales Act, § 16 (b); ante, p. 263.

¹²⁰ Sales Act, § 47 (2).

¹²⁰ *Isherwood v. Whitmore*, 11 Mees. & W. 347, 10 Mees. & W. 757; *Lorymer v. Smith*, 1 Barn. & C. 1; *Croninger v. Crocker*, 62 N. Y. 151; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; *Charles v. Carter*, 96 Tenn. 607, 36 S. W. 396; *Sun Pub. Co. v. Foundry Co.*, 22 Or. 49, 29 Pac. 6. Where delivery of hides was to be on payment of draft, an offer to allow examination at the railway station was sufficient. *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012. A purchaser of lumber, sent to his yard in box cars in which it cannot be examined, may unload, inspect, and examine before acceptance. *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17. Where by the contract the seller was to deliver iron of specified quality f. o. b. at Liverpool, and the buyer was to pay by bills of exchange at 60 days on delivery of shipping documents at New York, his right of inspection continued till the iron arrived in New York, and payment after receipt of the documents, but before opportunity to inspect, did not conclude the buyer from denying on acceptance. *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. Although the place of delivery is ordinarily the place of inspection, the seller may consent to inspection at another place. *Cefalu v. Fitzsimmons-Derrig Co.*, 65 Minn. 480, 67 N. W. 1018.

¹²¹ *Castle v. Swarder*, 80 Law J. Exch. 310, 312, per Cockburn, C. J. The circumstances of the sale may be such that the law will

time he cannot afterwards reject the goods.¹³³ The right of inspection carries with it the right, if necessary for the purpose of testing, to use a reasonable quantity of the goods.¹³³

As we have seen, where the seller delivers goods according to order for transportation to the buyer, as a rule, if the goods conform to the description, the property passes upon shipment.¹³⁴ Nevertheless the buyer has the right of inspection before acceptance, and if they do not correspond with the contract the property does not pass, and upon inspection the buyer may refuse to accept them.¹³⁵ Where goods are shipped C. O.

not imply the right to inspect before delivery and payment. *Pettitt v. Mitchell*, 4 Man. & G. 819.

If the buyer does not make a sufficient inspection, he cannot defend an action for the price on the ground that it would have taken several hours. *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891.

¹³³ *Toulmin v. Hedley*, 2 Car. & K. 157; *Lincoln v. Gallagher*, 79 Me. 189, 8 Atl. 883; *Doane v. Dunham*, 79 Ill. 131; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657; *Boothby v. Scales*, 27 Wis. 626; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777; *Knoblauch v. Kronschnabel*, 18 Minn. 300 (Gil. 272); *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196.

Where iron was shipped from Liverpool to New York in three shipments, and each lot was inspected within 10 days of its arrival, and the buyer notified his rejection within a month after arrival of the first shipment, the delay was not so great as to be held unreasonable as matter of law. *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831.

What is a reasonable time depends on the circumstances, including the fact of their being perishable or nonperishable. *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891.

¹³⁴ *Philadelphia Whiting Co. v. White-Lead Works*, 58 Mich. 29, 24 N. W. 861. Cf. *Nelson v. Overman*, 38 S. W. 882, 19 Ky. Law Rep. 161; *Zipp Mfg. Co. v. Pastorino*, 120 Wis. 176, 97 N. W. 904. But, where the buyer has notified the seller of his rejection, he cannot use a portion of the goods in making a test, for the purpose of determining the question of their fitness, or of providing evidence of their unfitness, and still insist on his right to reject them. *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895.

¹³⁵ *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017; ante, p. 155.

¹³⁶ Ante, p. 159. *Well v. Stone*, 83 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243.

"It is said that, on the delivery of the iron on shipboard at Liverpool, the title vested in the plaintiffs, and that the vesting of the title in the vendees implies an acceptance, and is inconsistent with

D., according to the weight of authority, the property passes; the condition merely having the effect of reserving the seller's lien for the price.¹⁸⁶ Whether the right of inspection exists in such cases is a question on which the authorities are not in accord.¹⁸⁷

the alleged right of inspection and rejection on its arrival in New York. There can be no doubt that, on delivery to the carrier of iron corresponding with the contract, the title would immediately vest in the purchasers, and the iron would thereafter be at their risk; nor is there any doubt of the general rule that delivery of goods corresponding with the contract is a condition precedent to the vesting of the title in the vendee. * * * But, assuming that the title to the iron for some purposes vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York." *Pierson v. Crooks*, *supra*.

Although under the circumstances of the case the property passes, the buyer may reject if on examination the goods do not fulfill the conditions. *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742.

Where the goods fulfill the conditions and the property has passed, but the goods are destroyed, so that an examination is impossible, the buyer is not relieved from liability to pay the price. *Wadhams & Co. v. Balfour*, 32 Or. 313, 51 Pac. 642.

Where the terms are cash, and the goods are to be delivered f. o. b. at the place of manufacture, the inspection, if any, must be made at that place. *Lawder & Sons Co. v. Grocery Co.*, 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795.

¹⁸⁶ Ante, p. 157.

¹⁸⁷ That the right exists, see *Lyons v. Hill*, 46 N. H. 49, 88 Am. Dec. 189; *Thick v. Railway Co.*, 137 Mich. 708, 101 N. W. 64, 109 Am. St. Rep. 694. That it does not exist, see *Wiltse v. Barnes*, 46 Iowa, 210. A question for the jury: *Louisville Lithographic Co. v. Schedler*, 23 Ky. Law Rep. 465, 63 S. W. 8. The question is discussed 18 Harv. Law Rev. 386.

Sales Act, § 47 (3), provides that the buyer is not entitled to examine the goods in the absence of agreement permitting it. Prof. Williston says that this subsection states the actual practice of large express companies, and probably states the existing law, citing *Wiltse v. Barnes*, *supra*.

ACCEPTANCE.

94. The buyer is deemed to have accepted the goods—

- (a) When he intimates to the seller that he has accepted them, or
- (b) When the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or
- (c) When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.¹³⁸

Duty to Accept.

Acceptance and delivery being concurrent conditions, the duty to accept does not arise unless the delivery or offer of delivery is sufficient. Therefore the buyer is not bound to accept unless he has had an opportunity to inspect,¹³⁹ or, on a sale by sample, unless he has had an opportunity to compare the bulk with the sample,¹⁴⁰ or unless the offer of delivery is made at a proper time,¹⁴¹ or if the delivery is of too great or too small a quantity.¹⁴² On the other hand, if the delivery or offer of delivery is good, the buyer is bound to accept. If the contract of sale is such that the seller need not send the goods, the buyer is bound to accept if the seller affords him reasonable facilities to remove the goods.¹⁴³

Meaning of "Acceptance."

"Acceptance" in performance of the contract is an assent by the buyer that the goods are to be taken by him under and in performance of the contract.¹⁴⁴ Acceptance may, however, be implied from the buyer's conduct, in which case he is deemed to have assented. Acceptance in performance of the contract appears to be generally identical with the acceptance necessary to satisfy the statute of frauds, as the statute is construed in the United States.¹⁴⁵ But in England, where any dealing with

¹³⁸ Sales Act, § 48.

¹³⁹ Ante, par. 92.

¹⁴⁰ *Lorymer v. Smith*, 1 Barn. & C. 1; *Toulmin v. Hedley*, 2 Car. & K. 157. Ante, p. 264.

¹⁴¹ Ante, p. 277 et seq.

¹⁴² Ante, p. 281 et seq.

¹⁴³ Ante, p. 273.

¹⁴⁴ Ante, p. 85.

¹⁴⁵ Ante, p. 91.

the goods which recognizes a pre-existing contract of sale is now held to constitute an acceptance under the statute,¹⁴⁶ an acceptance in performance of the contract is, of course, quite different from a statutory acceptance.

Same—Express Acceptance.

Of express acceptance—that is, acceptance where the buyer intimates to the seller that he accepts the goods—little need be said. Any form of words that expresses assent is enough.¹⁴⁷ As we have seen, acceptance may precede delivery; and where the sale is of a specific chattel in a deliverable state, in which the property passes at once, the acceptance is expressed by the contract itself.¹⁴⁸

Same—Implied Acceptance—Acts of Ownership.

Acceptance is implied from a resale or from any act on the part of the buyer which he would not have a right to perform if he were not the owner of the goods.¹⁴⁹ The rule in this respect is the same as under the statute of frauds.¹⁵⁰ Thus where the bulk was inferior to the sample, but the buyer offered the goods on sale at a limited price at auction, although the limit was not reached, it was held that he could not afterwards reject.¹⁵¹ A sale of a part constitutes an acceptance of the whole.¹⁵²

¹⁴⁶ Ante, p. 89.

¹⁴⁷ *Saunders v. Topp*, 4 Exch. 390, 18 Law J. Exch. 374.

¹⁴⁸ Ante, p. 85.

¹⁴⁹ *Parker v. Palmer*, 4 Barn. & Ald. 387; *Chapman v. Morton*, 11 Mees. & W. 534; *Harnor v. Groves*, 15 O. B. 667; *Perkins v. Bell* (1893) 1 Q. B. 198; *Warden v. Marshall*, 99 Mass. 805; *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608; *Delamater v. Chappell*, 48 Md. 245; *Hill v. McDonald*, 17 Wis. 97; *Van Winkle v. Crowell*, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880; *Carleton v. Jenks*, 80 Fed. 937, 26 C. C. A. 265; *Woodward v. Emmons*, 61 N. J. Law, 281, 39 Atl. 703; *Rock Island Plow Co. v. Meredith*, 107 Iowa, 498, 78 N. W. 233; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707; *George D. Sisson Lumber & Shingle Co. v. Haak*, 139 Mich. 383, 102 N. W. 946.

¹⁵⁰ Ante, p. 86.

¹⁵¹ *Chapman v. Morton*, 11 Mees. & W. 534.

¹⁵² *Parker v. Palmer*, 4 Barn. & Ald. 387; *Lenz v. Blake-McFall Co.*, 44 Or. 569, 76 Pac. 356. Where two articles are sold under an entire contract, an acceptance of one is an acceptance of both. *Buckeye-Buggy Co. v. Montana Stables* (Wash.) 85 Pac. 1077.

Same—Failure to Reject.

Although receipt is totally distinct from acceptance, receipt will become acceptance if the right to reject is not exercised within a reasonable time.¹⁵⁵ What is a reasonable time is a question of fact depending on the circumstances of the case.¹⁵⁶ A usage of the Liverpool corn market, allowing the buyer one day to object on the ground that the corn is not equal to sample, has been held reasonable and binding on the buyer.¹⁵⁷ The same has been held of a usage not to examine goods sold at wholesale until opened for sale to consumers in due course of trade.¹⁵⁸ The time within which the right to reject shall be exercised may be fixed by agreement.¹⁵⁷ If the buyer rightfully rejects, he is not bound to return the goods, but need do no more than notify the seller of his refusal to accept.¹⁵⁹

¹⁵⁵ *Sanders v. Jameson*, 2 Car. & K. 557; *Hobbs v. Whip Co.*, 159 Mass. 194, 33 N. E. 495; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Mason v. Smith*, 130 N. Y. 474, 29 N. E. 749; *Treadwell v. Reynolds*, 39 Conn. 31; *Boughton v. Standish*, 48 Vt. 594; *Watkins v. Paine*, 57 Ga. 50; *Carondelet Iron Works v. Moore*, 78 Ill. 85; *Gaff v. Homeyer*, 59 Mo. 345; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Knoblauch v. Kronschnabel*, 18 Minn. 300 (Gil. 272); *Berthold v. Manufacturing Co.*, 89 Iowa, 506, 56 N. W. 609; *Foss-Schneider Brewing Co. v. Bullock*, 8 C. C. A. 14, 59 Fed. 83; *Black v. Delbridge*, *Brooks & Fisher Co.*, 90 Mich. 56, 51 N. W. 269; *Gray v. Ice-Mach. Co.*, 103 Ga. 105, 29 S. E. 604; *Auerbach v. Wunderlich*, 76 Minn. 42, 78 N. W. 871; *H. McCormick Lumber Co. v. Winans*, 126 Wis. 649, 105 N. W. 945; *Jones v. Bloomgarden*, 143 Mich. 323, 106 N. W. 891. But where articles not corresponding with the sample were retained with the understanding that the seller should make them correspond, and not be paid till he had done so, no acceptance could be implied. *Belt v. Stetson*, 26 Minn. 411, 4 N. W. 779.

¹⁵⁶ Where the buyer, who had bought by sample a hogshead of cider, wrote to the seller that it was unsalable, and that, "should this continue," he would be obliged to return it, and the seller did not reply for 27 days, when he demanded payment, 20 gallons having then been consumed, it was held that the seller had by his silence consented to a further trial, and that there was no acceptance. *Lucy v. Monflet*, 5 Hurl. & N. 229.

¹⁵⁵ *Sanders v. Jameson*, 2 Car. & K. 557.

¹⁵⁶ *Doane v. Dunham*, 79 Ill. 131. See, also, *Tasker v. Crane Co. (C. C.)* 55 Fed. 449.

¹⁵⁷ *Potter v. Lee*, 94 Mich. 140, 53 N. W. 1047; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660.

¹⁵⁸ *Grimoldby v. Wells*, L. R. 10 C. P. 391; *McCormick Harvest-*

Effect of Acceptance.

Whether acceptance of the goods, if they do not conform in quality to the terms of the contract, discharges the seller from liability in damages for breach of the seller's promise or warranty in that respect, is a question on which there is much conflict of authority. If there was an express warranty of quality, the courts are substantially unanimous that a right of action for damages survives acceptance.¹⁹⁹ Many courts, however, hold that a different rule applies if the warranty is implied.²⁰⁰ This subject will be taken up in treating of the remedies of the buyer for breach of warranty.²⁰¹

Whether the buyer, by accepting a delivery of the goods after the time fixed therefor by the terms of the contract, waives any claim for damages he may have arising from the delay, is also a question on which the cases are not in agreement. On principle, it seems that, in the absence of agreement, express or implied, that the goods are taken in full discharge of the contract, he does not, and that the seller, having failed to perform his contract, is liable to the buyer for any damages he may have suffered in consequence of the late delivery; and many cases so hold.²⁰² Some cases hold, however, that

ing Mach. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; *Exhaust Ventilator Co. v. Railway Co.*, 69 Wis. 454, 34 N. W. 509; *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636, 31 N. W. 561; *Hardt v. Electric Co.*, 84 App. Div. 249, 82 N. Y. Supp. 835; *Rheinstrom v. Steiner*, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699; *Sale of Goods Act*, § 36; *Sales Act*, § 50.

¹⁹⁹ Post, p. 370.

²⁰⁰ Post, p. 373.

²⁰¹ Post, p. 368.

²⁰² *Dignan v. Spurr*, 3 Wash. 309, 28 Pac. 529; *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033; *Redlands Orange Growers' Ass'n v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718; *Belcher v. Sellards*, 19 Ky. Law Rep. 1571, 43 S. W. 676 (but see *Lucile Min. Co. v. Fairbanks, Morse & Co.*, 27 Ky. Law Rep. 1100, 87 S. W. 1121). See, also, *Strain v. Manufacturing Co.*, 80 Tex. 622, 16 S. W. 625; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25.

"A contractor, by taking what he can get under his contract when he can get it, no more necessarily and as matter of law waives a claim for damages for failure to perform on time than he necessarily waives a defect of quality by accepting goods." *Garfield & Proctor Coal Co. v. Railroad Co.*, 168 Mass. 119, 44 N. E. 119, per Holmes, J.

the acceptance is a waiver, unless qualified by a reservation by the buyer of the right to claim damages for a delay.¹⁰³

These and other vexed questions would be set at rest by the proposed Sales Act by the following provision: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or sale."¹⁰⁴

Buyer's Liability for Failure to Accept Delivery.

In *Greaves v. Ashlin*,¹⁰⁵ Lord Ellenborough said: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room, or he may bring an action for not removing them, should he be prejudiced by such delay." In accordance with this dictum the English Sale of Goods Act enacts: "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods."¹⁰⁶ This provision is followed by the proposed American Sales Act.¹⁰⁷

¹⁰³ *Minneapolis Threshing Mach. Co. v. Hutchings*, 65 Minn. 89, 67 N. W. 807.

¹⁰⁴ Section 49. The section also provides: "But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." This, says Prof. Williston, "Imposes a qualification sanctioned by good business practice and to some extent by law, both in this country and in Europe." *Post*, p. 371.

¹⁰⁵ 3 Camp. 426. See, also, *Bloxam v. Sanders*, 4 Barn. & C. 941, per Bailey, J. Cf. *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394; *Tripp v. Machine Co.*, 69 N. H. 233, 45 Atl. 746; *post*, p. 348.

¹⁰⁶ Section 37.

¹⁰⁷ Section 51. The section also provides: "If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default." See sections 60-65. Cf. section 45.

PAYMENT.

95. IN CASH. Unless the contract of sale otherwise provides, the buyer must pay in cash.

96. BY NEGOTIABLE SECURITY. Where a negotiable security to which the buyer is a party is received in payment of the price, the presumption in most jurisdictions is that such payment is conditional, though in some jurisdictions the presumption is that it is absolute.

Since delivery and payment are, unless the contract provides otherwise, concurrent conditions, the duty of the buyer to pay does not ordinarily arise unless the seller is ready and willing to deliver.¹⁶⁸ But at common law a debtor has no right to wait until demand made, but must pay as soon as the money is due, at the peril of being sued; and since the seller is not bound, in the absence of express agreement, to carry the goods to the buyer,¹⁶⁹ it follows that in such cases, as soon as the sale is completed, if no time is given and the goods are ready for delivery, the buyer's duty to fetch and pay for them arises, and an action is at once maintainable against him for the price.¹⁷⁰ If the property has passed, he must pay for them, even if they have been destroyed while in the seller's possession.¹⁷¹ If credit is given, he has a right to their possession without payment.¹⁷²

Tender of Payment.

The buyer discharges his duty by a tender as well as by actual payment. To be a defense, the tender must be kept good, and the money in most jurisdictions must be actually paid into court. When this is done, and the plea is sustained, although the tender does not discharge the debt, it is a bar to the action; that is, the seller is entitled to the money paid into court, while the buyer recovers judgment with costs.¹⁷³ Upon

¹⁶⁸ See ante, p. 268.

¹⁷⁰ Ante, p. 273; Benj. Sales, § 707.

¹⁶⁹ Ante, p. 273.

¹⁷¹ Ante, p. 141 et seq.

¹⁷² Leonard v. Davis, 1 Black (U. S.) 476, 17 L. Ed. 222; ante, pp. 122, 269; post, p. 814.

¹⁷³ James v. Vane, 2 El. & El. 883, 29 Law J. Q. B. 169; Penny-packer v. Umberger, 22 Pa. 492; Wheeler v. Woodward, 68 Pa. 158; Taylor v. Railroad Co., 119 N. Y. 561, 23 N. E. 1106.

the subject of tender there is nothing peculiar to the law of sales, and the reader is referred elsewhere for the rules as to what constitutes a valid tender.¹⁷⁴

Payment by Negotiable Security—Conditional Payment.

Where the contract is silent as to the manner of payment, it is always implied that the payment shall be in cash.¹⁷⁵ The contract may, however, provide for payment by a negotiable security, as a promissory note or a bill of exchange, and such payment may be absolute or conditional, according to the agreement of the parties. But in the absence of any agreement to the contrary, express or implied, a payment by negotiable security is in most jurisdictions presumed to be conditional, so that if the security is not duly honored the seller's right to the price revives. This is the general rule where payment of an indebtedness is made by a bill or a note,¹⁷⁶ and it ordinarily applies although the debtor is not a party to the security, as drawer, acceptor, maker, or indorser.¹⁷⁷ But, where at the time of the sale the paper of a third person is taken in payment without indorsement or guaranty of the buyer, the presumption is that the note is taken in absolute payment;¹⁷⁸ though, if such paper is taken with the indorsement or guaranty of the buyer, the presumption is that it is only conditional payment.¹⁷⁹ Payment

¹⁷⁴ Clark, Cont. (2d Ed.) 440; Benj. Sales (7th Am. Ed.) § 712 et seq., and Bennett's note, p. 781.

¹⁷⁵ Ante, p. 123.

¹⁷⁶ 2 Daniel, Neg. Inst. (4th Ed.) § 1280; Norton, Bills & N. 19; Ames, Cas. Bills & N. p. 571, note 2, p. 874, par. 6; Benj. Sales, § 729 et seq., and Bennett's note, p. 773. An intention to take a bill or a note in absolute payment must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods or in discharge of the price. Stedman v. Gooch, 1 Esp. 5; Maillard v. Duke of Argyle, 6 Man. & G. 40; Kemp v. Watt, 15 Mees. & W. 672.

¹⁷⁷ Ames, Cas. Bills & N. 571, note 2.

¹⁷⁸ Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Breed v. Cook, 15 Johns. (N. Y.) 241; Noel v. Murray, 13 N. Y. 167; Blicknall v. Waterman, 5 R. I. 43; Eaton v. Cook, 32 Vt. 58; Bayard v. Shunk, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441; 2 Daniel, Neg. Inst. (4th Ed.) § 1264.

¹⁷⁹ Monroe v. Hoff, 5 Denio (N. Y.) 860; Butler v. Haight, 8 Wend. (N. Y.) 535; Whitney v. Goin, 20 N. H. 354. This presumption may

by check or draft is presumed to be conditional.¹⁸⁰ These various presumptions may all be rebutted by evidence showing a different intention on the part of the parties. In Massachusetts, Maine, Vermont, Indiana, and Louisiana, on the other hand, the ordinary rule is reversed; and, where a promissory note or bill of exchange is given in payment of an indebtedness, the payment is presumed to be absolute, though this presumption may be rebutted.¹⁸¹ The effect of the giving of a promissory note or bill of exchange in payment belongs to the law of negotiable instruments, and the reader is referred to the books upon that subject.

Payment to Agent.

Whether an agent is authorized to receive payment depends upon the law of agency, and need not here be considered. It is to be noted, however, that a factor, and generally an agent who is intrusted with the possession of goods with authority to sell them, is entitled to receive payment;¹⁸² but that a broker, and generally an agent who is not intrusted with the possession of the goods, is not entitled to receive payment.¹⁸³ "If a shopman, who is authorized to receive payment over the counter only, receives payment elsewhere than at the shop, the payment is not good."¹⁸⁴ Payment to an agent employed to sell must be in money, in the usual course of business.¹⁸⁵

be rebutted. *Soffe v. Gallagher*, 8 E. D. Smith (N. Y.) 507; 2 Daniel, Neg. Inst. (4th Ed.) § 1265.

¹⁸⁰ 2 Daniel, Neg. Inst. (4th Ed.) § 1623.

¹⁸¹ Daniel, Neg. Inst. (4th Ed.) § 1260; Ames, Cas. Bills & N. p. 571, note 2.

¹⁸² *Hornby v. Lacy*, 6 Maule & S. 166; *Fish v. Kempton*, 7 C. B. 687; *Whiton v. Spring*, 74 N. Y. 169, 173; *Selple v. Irwin*, 30 Pa. 513, 515; *Butler v. Dorman*, 68 Mo. 298, 300, 30 Am. Rep. 795; *Bailey v. Pardridge*, 134 Ill. 188, 27 N. E. 89; *Tiffany*, Ag. pp. 208, 223.

¹⁸³ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Higgins v. Moore*, 34 N. Y. 417; *Selple v. Irwin*, 30 Pa. 513; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Clark v. Smith*, 88 Ill. 298; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Tiffany*, Ag. p. 224.

¹⁸⁴ *Kaye v. Brett*, 5 Exch. 269, per Parke, B.

¹⁸⁵ *Catterall v. Hindle*, L. R. 1 C. P. 186, 35 Law J. C. P. 161, per Keating, J.; *McCulloch v. McKee*, 16 Pa. 289; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Aultman v. Lee*, 43 Iowa, 404.

EXCUSES FOR NONPERFORMANCE OF CONDITIONS.

97. WAIVER. The performance of a condition precedent may be waived.

98. RENUNCIATION OF CONTRACT. A party to a contract of sale, on whom the performance of a condition precedent rests, is excused from performance, if before or at the time of performance the other party absolutely refuses to perform or incapacitates himself from performance.

99. IMPOSSIBILITY OF PERFORMANCE. Impossibility of performance, arising after the formation of the contract, does not excuse the promisor, except—

- (a) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.¹⁸⁶
- (b) Where the impossibility is created by law.

Waiver.

The performance of a condition may be waived by the party in whose favor it exists, either expressly or by his acts or conduct.¹⁸⁷ For example, the condition of payment on delivery, implied in every sale not on credit, may be waived by delivery of the goods without requiring payment;¹⁸⁸ and a party may waive performance of a condition by refusing to accept or preventing performance.¹⁸⁹ Another example of waiver is where the buyer elects not to treat the nonperformance by the seller of a promise or warranty as a ground for rejecting the goods,

¹⁸⁶ Sales Act, § 8 (1).

¹⁸⁷ Benj. Sales, § 566.

¹⁸⁸ Ante, p. 132.

¹⁸⁹ *Hotham v. East India Co.*, 1 Term R. 645; *Cort v. Railway Co.*, 17 Q. B. 127; *Mackay v. Dick*, 6 App. Cas. 251; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Butler v. Butler*, 77 N. Y. 472, 475, 33 Am. Rep. 648; *Allen v. Jarvis*, 20 Conn. 88; *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32; *U. S. v. Peck*, 102 U. S. 65, 26 L. Ed. 46; *Eastern Granite Co. v. Helm*, 89 Iowa, 698, 57 N. W. 437; *Day v. Jeffords*, 102 Ga. 714, 29 S. E. 591; *De La Vergne Refrigerating Mach. Co. v. Railroad Co.*, 51 La. Ann. 1733, 26 South. 455; *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *North v. Mallory*, 94 Md. 305, 51 Atl. 89. See Clark, *Cont.* (2d Ed.) 447.

but to go on with the contract and seek his remedy in an action or counterclaim for damages.¹⁹⁰

Renunciation of Contract.

The performance of a condition precedent is not necessary if the other party, before the time for performance arrives, absolutely refuses to perform, or incapacitates himself from performing, his promise. "*Lex neminem ad vana cogit.*"

The renunciation must amount to an absolute refusal to perform.¹⁹¹ Such a renunciation is generally held to be equivalent to a breach of the contract, and to entitle the other party to sue for the breach without waiting for the time fixed by the contract for performance.¹⁹² But the other party may refuse to accept the renunciation, and may insist upon the performance of the contract;¹⁹³ although he may not continue to perform and

¹⁹⁰ Behn v. Burness, 32 Law J. Q. B. 204; Hellbutt v. Hickson, L. R. 7 C. P. 438, 450; ante, p. 231; post, p. 372.

¹⁹¹ Johnstone v. Milling, 16 Q. B. Div. 460; Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; Smoot's Case, 15 Wall. (U. S.) 36, 21 L. Ed. 107. As to renunciation, see Clark, Cont. (2d Ed.) 444; and as to impossibility created by act of party, see Clark, Cont. (2d Ed.) 448.

¹⁹² Hochster v. De la Tour, 2 El. & Bl. 678; Frost v. Knight, L. R. 7 Exch. 111; Roper v. Johnson, L. R. 8 Q. P. 167; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Eckenrode v. Chemical Co., 55 Md. 51; James v. Adams, 16 W. Va. 245; Platt v. Brand, 28 Mich. 173; McCormick v. Basal, 46 Iowa, 235; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332; Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; Stokes v. Mackay, 147 N. Y. 223, 41 N. E. 496; Pancake v. George Campbell Co., 44 W. Va. 82, 28 S. E. 719; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. And see Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 33 L. R. A. 760; King v. Waterman, 55 Neb. 324, 75 N. W. 830. Contra, Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384. For a discussion of this question, see 14 Harv. Law Rev. 421. As to the measure of damages, post, p. 350.

¹⁹³ Avery v. Bowden, 5 El. & Bl. 714; Johnstone v. Milling, 16 Q. B. Div. 460; Smoot's Case, 15 Wall. (U. S.) 36, 21 L. Ed. 107; Zuck v. McClure, 98 Pa. 541; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285.

If the promisee does not treat the renunciation as a ground for putting an end to the contract, but continues to insist on performance, the contract remains in existence for the benefit of and at the risk of both parties. Avery v. Bowden, supra; Smith v. Banking Co., 113 Ga. 975, 39 S. E. 410, and cases cited supra.

recover full damages based on full performance, that is, he may not increase his damages by a useless performance.¹⁹⁴ The effect of the renunciation, however, if not withdrawn, is to excuse him from tendering performance of the conditions incumbent upon him.¹⁹⁵ The rule applies equally to a renunciation after partial performance. Thus, if after a partial delivery the buyer gives notice to the seller that he will accept no further deliveries, the seller may sue for breach of contract without averring performance, and upon the simple averment that he was ready and willing to perform, and had been prevented from so doing by the buyer.¹⁹⁶

A fortiori the contract is discharged when one of the parties makes it impossible to perform his promise. Thus where the seller agrees to sell a specified ox, and before the time for delivery consumes it,¹⁹⁷ or contracts to sell specific goods, and before the day for delivery sells them to another,¹⁹⁸ the buyer may sue for the breach without tendering the price.

Insolvency of Buyer.

The mere insolvency of the buyer does not excuse the seller from performance, since the assignee or trustee of the insolvent may elect to complete the contract;¹⁹⁹ but, in case of the in-

¹⁹⁴ Post, p. 851.

¹⁹⁵ *Bunge v. Koop*, 49 N. Y. 225, 8 Am. Rep. 546; *Crist v. Armour*, 84 Barb. (N. Y.) 378; *McPherson v. Walker*, 40 Ill. 372; *Daniels v. Newton*, 114 Mass. 530, 533, 19 Am. Rep. 394; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981. See, also, cases cited in note 198, post.

¹⁹⁶ *Cort v. Railway Co.*, 17 Q. B. 127; *Hosmer v. Willson*, 7 Mich. 294, 74 Am. Dec. 716; *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362; *Parker v. Russell*, 133 Mass. 74; *Haines v. Tucker*, 50 N. H. 307, 311; *Canda v. Wick*, 100 N. Y. 127, 2 N. E. 381; *Textor v. Hutchings*, 62 Md. 150; *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250; *Farwell v. Solomon*, 170 Mass. 457, 49 N. E. 738.

¹⁹⁷ *Benj. Sales*, § 567.

¹⁹⁸ *Bowdell v. Parsons*, 10 East, 359; *Hawley v. Keeler*, 53 N. Y. 114; *Parker v. Pettit*, 43 N. J. Law, 512; *Smith v. Jordan*, 13 Minn. 264 (Gil. 246), 97 Am. Dec. 234; *Newcomb v. Brackett*, 16 Mass. 161; *Ft. Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786. Contra: *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857.

While the seller may reacquire the goods before the time for performance, the chance is remote. See 14 Harv. Law Rev. 427.

¹⁹⁹ *In re Bessemer Steel Co.*, 4 Ch. Div. 108; *Pardee v. Kanaday*,

solvency of the buyer, the seller may require payment of cash on delivery, although he may have agreed to give credit,²⁰⁰ and, if the assignee or trustee does not elect to complete the contract, the seller may treat the insolvency as a renunciation of the contract.²⁰¹

Impossibility of Performance.

As we have seen, impossibility of performance, which arises from the nonexistence of the thing sold at the time of the formation of the contract, avoids the contract.²⁰² The question now under consideration is how far impossibility arising subsequently to the formation of the contract discharges it, and therefore constitutes an excuse for nonperformance.

The general rule is that no impossibility arising subsequently to the formation of the contract is an excuse for nonperformance.²⁰³ The promisor who promises unconditionally takes the risk of being unable to perform, even though his inability should be caused by inevitable accident or other circumstances beyond his control.²⁰⁴ Thus, where the seller has contracted to deliver goods, he is liable for failure to deliver, notwithstanding that delivery was rendered impossible by frosts or freshets or other causes obstructing navigation or transporta-

100 N. Y. 121, 2 N. E. 885; *Rappleye v. Seeder Co.*, 79 Iowa, 220, 228, 44 N. W. 363, 7 L. R. A. 139; *Florence Min. Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424. See, also, *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

²⁰⁰ *Ex parte Chalmers*, 8 Ch. 289; *Pardee v. Kanaday*, *supra*; *Rappleye v. Seeder Co.*, *supra*; *Florence Min. Co. v. Brown*, *supra*; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

²⁰¹ *Ex parte Chalmers*, *supra*; *Morgan v. Bain*, 10 C. P. 15.

Where the buyer makes an assignment for benefit of creditors, the seller may refuse to complete the contract. *Rappleye v. Seeder Co.*, *supra*.

²⁰² *Ante*, p. 45.

²⁰³ *Clark*, *Cont.* (2d Ed.) 472.

²⁰⁴ *Ashmore v. Cox & Co.* (1899) 1 Q. B. 436 (shipment between dates fixed prevented by outbreak of war); *Summers v. Hibbard*, *Spencer Bartlett & Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 693, 49 L. R. A. 572, 81 Am. St. Rep. 467; *Adams v. Ames*, 19 Wash. 425, 53 Pac. 546.

tion,²⁰⁵ or by pestilence,²⁰⁶ or by the destruction of the seller's factory by fire,²⁰⁷ or by droughts stopping his mill.²⁰⁸

Same—Destruction of Thing Sold.

An exception to the general rule arises when the impossibility is caused by the destruction of the subject-matter of the contract before breach, and without default of the contractor. The contract is said to be subject to an implied condition to this effect. Where the continued existence of a specific thing is essential to the performance of a contract, the destruction from no fault of either party operates as a discharge.²⁰⁹ Therefore, where the contract is for the sale of specific goods which perish without the fault of the seller or the buyer before the day appointed for delivery, the seller is excused from the obligation to deliver, and the buyer from obligation to pay.²¹⁰ If, however, the property has already passed, although the goods are still in the possession of the seller, the buyer must pay the price.²¹¹ So where goods are to be manufactured in a particular factory, which is destroyed,²¹² or grown in a particular field, and the crop fails,²¹³ the seller and the buyer are excused.

²⁰⁵ *Kearon v. Pearson*, 7 Hurl. & N. 386, 81 Law J. Exch. 1; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Bacon v. Cobb*, 45 Ill. 47 (seizure of railroad by government to transport troops).

²⁰⁶ *Barker v. Hodgson*, 3 Maule & S. 267.

²⁰⁷ *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644; *Booth v. Mill Co.*, 60 N. Y. 487.

²⁰⁸ *Eddy v. Clement*, 38 Vt. 486.

²⁰⁹ *Clark*, Cont. (2d Ed.) 475.

²¹⁰ *Rugg v. Minett*, 11 East, 210; *Howell v. Coupland*, L. R. 9 Q. B. 462, 1 Q. B. Div. 258; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Thompson v. Gould*, 20 Pick. (Mass.) 134, 139; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325. See Sale of Goods Act, § 7; Sales Act, § 8. The latter act adds a subsection to cover the case of deterioration or partial destruction, which Prof. Williston says is believed to express the existing law. See *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1062.

²¹¹ *Taylor v. Caldwell*, 3 Best & S. 826, 32 Law J. Q. B. 164, per Blackburn, J. Ante, p. 141. So if by agreement the risk has passed to the buyer. Ante, p. 142.

²¹² See *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. Where defendant contracted to sell a cargo of cotton seed to

²¹³ *Howell v. Coupland*, 1 Q. B. Div. 258. Cf. *Anderson v. May*, 50 Minn. 280, 52 N. W. 630, 17 L. R. A. 555, 36 Am. St. Rep. 642.

The distinction between cases in which the destruction of the thing sold is held to be an excuse, and those in which the performance is prevented by other causes beyond the promisor's control, is also sometimes placed upon the ground that in the former cases the performance is physically impossible, "*quod natura fieri non concedit*," and that in the latter cases performance is in its nature possible, notwithstanding that the promisor is unable to perform it.²¹⁴

Same—Legal Impossibility.

A second exception arises where the impossibility resulting is created by the law. If, after the contract is entered into, a statute is passed rendering it illegal, the promisor is no longer bound.²¹⁵

be shipped at A. during January per ship O., and the ship stranded in December, so that shipment in January became impossible, the seller was not liable for failure to ship. *Nickoll v. Ashton & Co.* (1901) 2 K. B. 123.

²¹⁴ *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644, per Clifford, J.; *Benj. Sales*, § 570.

²¹⁵ *Bailly v. De Crespigny*, L. R. 4 Q. B. 180; *Brick Presbyterian Church v. City of New York*, 5 Cow. (N. Y.) 538; *Cordes v. Miller*, 89 Mich. 581, 33 Am. Rep. 430; *Mississippi & T. R. Co. v. Green*, 9 Heisk. (Tenn.) 588; *Clark, Cont.* (2d Ed.) 474. As to impossibility arising from the action of the courts, see *Malcomson v. Mills* (O. C.) 88 Fed. 680; *Clark, Cont.* (2d Ed.) 475.

Where defendants sold certain coffee to plaintiff, to be delivered at New York at a certain time, the refusal of the board of health to allow the coffee to land rendered the contract impossible of performance according to its terms, so as to excuse defendants from such performance. *J. H. Labaree v. Crossman*, 100 App. Div. 499, 92 N. Y. Supp. 585, affirmed 184 N. Y. 588, 77 N. E. 1189.

CHAPTER IX.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

- 100. In General.
- 101-105. Seller's Lien.
- 106-109½. Stoppage in Transitu.
- 110. Right of Resale.
- 111. Right to Rescind.

IN GENERAL.

100. Notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller, as such, may have certain rights against the goods, viz.:
- (a) A lien on the goods or right to retain them for the price while he is in possession of them.
 - (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.
 - (c) A right of resale.
 - (d) A right, in some jurisdictions, to rescind the sale.¹

When the property in goods passes by a sale, it does not follow necessarily that the right of possession also passes. So long as the goods remain in the seller's possession he has, unless he has waived it, a lien for the payment of the price. Even if they have passed out of his actual possession into the hands of a carrier for delivery to the buyer, he has the right, in case of the latter's insolvency, to intercept the goods, and to prevent them from coming into his actual possession.² When he has exercised his right of lien or of stoppage in transitu, he has, under certain circumstances, the right to resell the goods;³ and in many jurisdictions he has the right, under certain circumstances, to rescind the sale and resume the property in the goods.⁴

¹ See Sales Act, § 53.

² Post, p. 322.

³ Post, p. 339.

⁴ Post, p. 342.

SELLER'S LIEN.

101. The unpaid seller of goods, who is in possession of them, is entitled to a lien for the price, unless he has, expressly or by implication, waived it; that is, he is entitled to retain possession of the goods until payment or tender of the price.
102. **WAIVER BY GIVING CREDIT.** The seller waives his lien by implication, unless there is an agreement to the contrary:
 - (a) If he sells the goods on credit.
 - (b) If he takes a bill of exchange or other negotiable instrument in conditional payment.
103. **REVIVAL.** The lien of a seller who is still in possession of the goods revives:
 - (a) When the goods have been sold on credit, but the term of credit has expired.
 - (b) When the seller has taken a bill of exchange or other negotiable instrument in conditional payment, and the condition on which it was received has been broken by the dishonor of the instrument or otherwise.
 - (c) When the goods have been sold on credit, or the seller has taken a negotiable instrument in conditional payment, and the buyer becomes insolvent, although the term of credit has not expired or the instrument received in conditional payment has not matured, and notwithstanding that the seller is in possession of the goods as agent or bailee for the buyer.⁵
104. **TERMINATION.** The seller loses his lien:
 - (a) When he unconditionally delivers the goods to the buyer or his agent; subject, however, to the revival of the lien if he continues in possession of the goods as agent or bailee for the buyer and the buyer becomes insolvent, as stated in the last section (c).
 - (b) When he assents to a subsale.
105. **DELIVERY OF PART.** When the seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such delivery has been made under such circumstances as to show an intention of waiving his lien.⁶

⁵ For statutory changes in respect to the seller's right to exercise his lien when in possession as agent or bailee of the buyer, post, p. 318.

⁶ Sales Act, § 55.

A "lien," in general, may be defined as a right to retain the possession of a thing until a debt due to the person retaining possession is satisfied.⁷ The origin of the seller's lien is doubtful, but it is probably founded on the custom of merchants.⁸ It has been said that "the term 'lien' is unfortunate, because the seller's rights, arising out of his original ownership, in all cases exceed a mere lien."⁹ That his rights exceed a mere lien will appear from a consideration of the peculiar rights which arise in case of the buyer's insolvency¹⁰ and of the seller's right to resell.¹¹ But as the rule is that when there is no agreement, express or implied, to the contrary, the seller has a right to retain the goods until the payment or tender of the price, he has in all cases, at least, a lien, unless he has waived it.¹²

The lien extends only to the price. If, by reason of the buyer's default in payment, the seller incurs warehouse charges or other expenses in keeping the goods, his lien does not extend to such charges, which are incurred for his own benefit, and not for the benefit of the buyer; and his remedy, if any, is a personal one against the buyer.¹³

⁷ *Benj. Sales*, § 796.

⁸ *Blackb. Sales*, 453.

⁹ *Chalm. Sale of Goods Act* (6th Ed.) 83.

¹⁰ *Post*, p. 315.

¹¹ *Post*, p. 339. See *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348; *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357.

¹² *Miles v. Gorton*, 2 Crompt. & M. 504; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 39, 50 Am. Dec. 754; *Ware River R. Co. v. Vibbard*, 114 Mass. 447; *Cornwall v. Haight*, 8 Barb. (N. Y.) 327; *Owens v. Weedman*, 82 Ill. 409; *Bradley v. Michael*, 1 Ind. 551; *Southwestern Freight & Cotton Press Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

A tender of the price terminates the lien. *Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519. See *Sales Act*, § 54 (1) (a).

¹³ See *British Empire Shipping Co. v. Somerset*, El., Bl. & El. 353, 27 Law J. Q. B. 397; in exchequer chamber, El., Bl. & El. 367, 28 Law J. Q. B. 220; in house of lords, 8 H. L. Cas. 338, 30 Law J. Q. B. 229; *Crommelin v. Railroad Co.*, *43 N. Y. 90; *Burke v. Dunn*, 117 Mich. 430, 75 N. W. 931. If the buyer refuses to accept the goods sold until the seller recovers judgment for the price, the buyer cannot recover for the care of the goods between the sale and the delivery, since the care of them in the meantime is for his own benefit. *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394.

A special interest in the goods may continue to exist in the seller by agreement, even after delivery; but such an interest is not strictly a lien, which is always determinable on the loss of possession.¹⁴

Waiver of Lien.

"Lien is not the result of an express contract; it is given by implication of law."¹⁵ The lien may, of course, be waived expressly. It may also be waived by implication,¹⁶ as by reserving an express lien for the price, which excludes an implied one.¹⁷

The lien is waived by implication when time is given for payment, and nothing is said as to delivery,—in other words, when the sale is on credit;¹⁸ although the parties may, of course, agree that notwithstanding the credit the goods are not to be delivered until payment, and the same term may be introduced into the contract by a usage to that effect.¹⁹ The seller also waives his lien by taking a bill or note payable at a distant day,²⁰ though the lien revives on its dishonor or on the insolvency of the buyer.²¹

¹⁴ *Dodsley v. Varley*, 12 Adol. & E. 632; *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740; *Sawyer v. Fisher*, 32 Me. 28. See *Woodland Co. v. Mendenhall*, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 445.

¹⁵ *Chambers v. Davidson*, L. R. 1 P. C. 296, 4 Moore, P. C. (N. S.) 158, per Lord Westbury.

¹⁶ When the seller of standing wood permitted the buyer to cut it, he waived his lien. *Douglas v. Shumway*, 13 Gray (Mass.) 499. See, also, *Allen v. Rushford*, 72 Neb. 907, 101 N. W. 1028. See Sales Act, § 56 (1) (c).

¹⁷ *In re Leith's Estate*, L. R. 1 P. C., at page 305. An agreement inconsistent with the existence of the lien is a waiver of it. *Pickett v. Bullock*, 52 N. H. 354.

¹⁸ *Spartali v. Benecke*, 10 C. B. 212, 19 Law J. C. P. 293; *Leonard v. Davis*, 1 Black. (N. S.) 476, 17 L. Ed. 222; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 39, 50 Am. Dec. 754; *McCraw v. Glimmer*, 83 N. C. 162; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113; *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232; ante, p. 269.

¹⁹ *Field v. Lelean*, 6 Hurl. & N. 617, 30 Law J. Exch. 163.

²⁰ *Valpy v. Oakeley*, 16 Q. B. 941, 951; *Griffiths v. Perry*, 28 Law J. Q. B. 204, 207; *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232. See, also, *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Horncastle*

²¹ Post, p. 315.

Revival of Lien—Expiration of Credit.

Although the sale is on credit, if the buyer permits the goods to remain in the seller's possession till the credit has expired, the lien which was waived by the giving of credit revives, even though the buyer may not be insolvent.²² And the rule is the same where bills or notes are given for the price, which are dishonored while the goods are still in the seller's possession.²³

Insolvency of Buyer.

If the buyer becomes insolvent²⁴ while the goods are in possession of the seller, the lien revives notwithstanding that the goods were sold on credit, and that the credit has not expired.²⁵ The lien also revives on insolvency, when conditional payment was made by bill or note, although the instrument has not yet matured.²⁶ This right to revive the lien is analogous to the

v. Farran, 3 Barn. & Ald. 497. Giving a promissory note, payable on demand, for the price, does not divest the lien. Clark v. Draper, 19 N. H. 419.

²² New v. Swain, 1 Dan. & L. 193; Bunney v. Poyntz, 4 Barn. & Adol. 568; Martindale v. Smith, 1 Q. B., at page 395; Owens v. Weedman, 82 Ill. 409; Benj. Sales, § 825. See Sales Act, § 54 (1) (b).

²³ Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204. See Sales Act, § 52 (1) (b).

²⁴ Meaning of insolvency, post, p. 825. See Sales Act, § 76 (3).

²⁵ Bloxam v. Sanders, 4 Barn. & C. 941; Bloxam v. Morley, Id. 951; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204; Gunn v. Bolckow, 10 Ch. App. 491; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Parks v. Hall, 2 Pick. (Mass.) 206, 212; Parker v. Byrnes, 1 Low. (U. S.) 539, Fed. Cas. No. 10,723, per Lowell, J.; Haskell v. Rice, 11 Gray (Mass.) 240, per Thomas, J.; Wanamaker v. Yerkes, 70 Pa. 443; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Southwestern Freight & Cotton Press Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Conrad v. Fisher, 37 Mo. App. 352, 9 L. R. A. 147; Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113; Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899; Bohn Mfg. Co. v. Hynes, 83 Wis. 388, 53 N. W. 684. See, also, Akeley v. Boom Co., 64 Minn. 108, 113, 67 N. W. 208. Contra, Barrett v. Goddard, 8 Mason (N. S.) 107, Fed. Cas. No. 1,406. It is immaterial whether the sale is of specific chattels or whether the contract is executory. Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204. See Sales Act, § 54 (1) (c).

²⁶ Valpy v. Oakeley, 16 Q. B. 941, 20 Law J. Q. B. 380; Griffiths v. Perry, 1 El. & El. 680, 28 Law J. Q. B. 204; Arnold v. Delano, 4 Cush. (Mass.) 33, 41, 50 Am. Dec. 754; Parker v. Byrnes, 1 Low.

right of stoppage in transitu, and has sometimes been called the right of "stoppage ante transitum."²⁷ "The vendor's right in respect of his price," said Bailey, J., in the leading case of *Bloxam v. Sanders*,²⁸ "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If the goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right." The same principle was clearly stated in a Pennsylvania case:²⁹ "Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage in transitu on account of the insolvency of the vendee; because these terms refer to the same right, only at different stages of performance and execution of the contract of sale. If the vendor has a right to stop in transitu, a fortiori he has a right of retainer before any transit has commenced."

(U. S.) 539, Fed. Cas. No. 10,728, per Lowell, J.; *Milliken v. Warren*, 57 Me. 46. It is immaterial whether the notes are taken in payment or as security. In *re Batchelder*, 2 Low. (U. S.) 245, Fed. Cas. No. 1,099; *Hunter v. Talbot*, 3 Smedes & M. (Miss.) 754. Where payment is to be on delivery in notes of a third person, who becomes insolvent, the seller need not deliver on tender of such notes. *Benedict v. Field*, 16 N. Y. 595.

"This revesting of the lien is not affected by the fact that * * * such notes or bills have been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred." *McElwee v. Lumber Co.*, 69 Fed. 302, 308, 16 C. C. A. 232. See, also, *Brewer Lumber Co. v. Railroad Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 875.

²⁷ *Benj. Sales*, § 767.

²⁸ 4 Barn. & C. 941.

²⁹ *White v. Welsh*, 38 Pa. 396, per Lowrie, C. J.

Even if the seller has broken his contract to deliver while the buyer is solvent, the lien revives on the buyer becoming insolvent.⁸⁰

It follows naturally, from the principle on which this right rests, that the seller does not lose his right to revive the lien on the insolvency of the buyer, although he may have agreed to hold the goods as the buyer's bailee.⁸¹ As in the case of stoppage in transitu, the right is not lost by a technical delivery, so long as the seller is in a position to prevent the goods from coming into the buyer's actual possession.

Termination of Lien—Delivery.

Inasmuch as the right of lien is a right incident to possession, the seller loses his lien when he unconditionally delivers the goods to the buyer.⁸² But if the delivery be upon the understanding, express or implied, that the seller is to receive immediate payment, he does not lose his lien, but may reclaim the

⁸⁰ *Valpy v. Oakeley*, 16 Q. B. 941, 20 Law J. Q. B. 380; *Griffiths v. Perry*, 1 El. & El. 680, 28 Law J. Q. B. 204.

⁸¹ *Townley v. Crump*, 4 Adol. & E. 58; *Grice v. Richardson*, 3 App. Cas. 319; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 38, 50 Am. Dec. 754; *Thompson v. Railroad Co.*, 28 Md. 396; *Conrad v. Fisher*, 37 Mo. App. 353, 8 L. R. A. 147; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93, 96.

By Sales Act, § 54 (2), following Sale of Goods Act, § 41 (2), the right of the seller holding as bailee to exercise his right of lien is not confined to cases where the buyer is insolvent. Post, p. 318.

⁸² *Gregory v. Morris*, 96 U. S. 619, 623, 24 L. Ed. 740; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 39, 50 Am. Dec. 754; *Haskins v. Warren*, 115 Mass. 514, 533; *Lupin v. Marie*, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256; *Bowen v. Burk*, 13 Pa. 146; *Johnson v. Farnum*, 56 Ga. 144; *Cook v. Perry*, 43 Mich. 629, 5 N. W. 1054; *Thompson v. Wedge*, 50 Wis. 642, 7 N. W. 560; *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910; *Meyers v. McAllister*, 94 Minn. 510, 103 N. W. 584. Delivery is not effected by merely marking the goods with the buyer's name or setting them aside. *Goodall v. Skelton*, 2 H. Bl. 316; *Dixon v. Yates*, 5 Barn. & Adol. 313; *Townley v. Crump*, 4 Adol. & E. 58. Or by boxing them by the buyer's orders, so long as the seller holds them as his, and has not given credit. *Boulter v. Arnott*, 1 Crompt. & M. 333. See, also, *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. 820.

"When the buyer or his agent lawfully obtains possession of the goods." Sales Act, § 56 (1) (b). Cf. section 76 (1) ("delivery").

goods if payment be not made.⁸² The seller may also lose his lien by a constructive delivery. "When the buyer is solvent, the cases as to what constitutes an 'actual receipt,' within the meaning of the statute of frauds, appear to furnish the test whether the seller's lien is gone or not."⁸⁴ "The principle," says Blackburn, J.,⁸⁵ "is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, so as to preserve his lien. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and the vendee that the possession shall henceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is sufficient receipt to satisfy the statute." When the buyer is insolvent, since the lien revives notwithstanding that the seller holds the goods as bailee for the buyer, the cases as to what constitutes an actual receipt no longer furnish a test.

If the goods are in possession of the seller, it seems that a delivery takes place, and the seller's lien is divested, whenever the parties agree that the seller shall thenceforth hold as the bailee of the buyer.⁸⁶ In England, however, this has been changed by the Sale of Goods Act,⁸⁷ following which the proposed American Sales Act provides: "The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee of the buyer."⁸⁸

If the goods are in the possession of the buyer, the effect of the contract being to transfer the right of possession as well as that of property, the delivery becomes complete, by necessity, without further act on either side.⁸⁹

⁸² Ante, p. 124. See *McGill v. Lumber Co.*, 111 Tenn. 552, 82 S. W. 210.

⁸⁴ Chalm. Sales, 62.

⁸⁵ *Cusack v. Robinson*, 30 Law J. Q. B., at page 264; ante, p. 94.

"But this proposition must now be taken subject to the provisions of section 41 (2)" Sale of Goods Act. Chalm. Sale of Goods Act (6th Ed.) 89.

⁸⁶ *Cusack v. Robinson*, supra. But see *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; ante, p. 95.

⁸⁷ Section 41 (2).

⁸⁸ Section 54 (2).

⁸⁹ *In re Batchelder*, 2 Low. (U. S.) 245, Fed. Cas. No. 1,099; *Warden v. Marshall*, 99 Mass. 305; *Martin v. Adams*, 104 Mass. 262; *Benj. Sales*, § 802; ante, p. 97.

If the goods are in the possession of a third person as bailee of the seller, a delivery takes place whenever such third person, with the seller's assent, attorns to the buyer, and not before.⁴⁰ Thus the transfer of a delivery order, dock warrant, or other document, which operates only as a token of authority to take possession, and not as a transfer of possession, does not divest the seller's lien, but the person in whose custody the goods are must first accept the order, or in some way attorn to the buyer, and until such attornment the seller may countermand his authority; and, even though the seller may have waived his lien by a sale on credit or by accepting conditional payment, he may nevertheless, upon the occurrence of the buyer's insolvency before such attornment, countermand the authority, and revive his lien.⁴¹ Under the factors' acts and other enactments, however, certain other documents are in many jurisdictions put on the same footing as bills of lading,⁴² and a transfer of such documents excludes the lien, if the documents get into the hands of a holder for value.⁴³

Same—Delivery to Carrier.

Delivery to a common carrier or other bailee for conveyance to the buyer is prima facie such a delivery of possession

⁴⁰McEwan v. Smith, 2 H. L. Cas. 309; Farina v. Home, 16 Mees. & W. 119; Keeler v. Goodwin, 111 Mass. 490; In re Batchelder, 2 Low. (U. S.) 245, Fed. Cas. No. 1,099; ante, p. 96.

⁴¹McEwan v. Smith, 2 H. L. Cas. 309; Arnold v. Delano, 4 Cush. (Mass.) 33, 39, 50 Am. Dec. 754, per Shaw, C. J.; Parker v. Byrnes, 1 Low. (U. S.) 539, Fed. Cas. No. 10,728; Keeler v. Goodwin, 111 Mass. 490.

Where goods were sold to be paid in cash on delivery of the warehouse receipt, and by the receipt the goods were deliverable on return of the receipt, the seller did not part with his lien by tender of the receipt to the buyer; the buyer refusing payment and the seller retaining the receipt. Rhodes v. Mooney, 43 Ohio St. 421, 4 N. E. 233.

⁴²Ante, p. 88.

⁴³In some states, warehouse receipts are by statute put on the same footing as bills of lading. In others they have been given the same effect by the courts without legislation. See Merchants' Bank of Detroit v. Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Allen v. Maury, 66 Ala. 10; ante, p. 85. As to factor's acts, ante, p. 88.

as puts an end to the seller's lien.⁴⁴ The right of lien becomes changed into a right of stoppage in transitu should the buyer become insolvent.⁴⁵ The seller may, however, reserve the right of possession or property in the goods.⁴⁶

Same—Assent to Subsale.

At common law, the seller's lien is not affected by any sale, pledge, or other disposition of the goods which the buyer may have made, unless he has assented thereto.⁴⁷ This follows, as we have seen, from the general principle, "Nemo dat quod non habet."⁴⁸ Thus where goods lying in a warehouse of a third person were sold, but not delivered, and were paid for in the buyer's acceptances, which were subsequently dishonored, and before they became due the buyer sold to a second purchaser, it was held that the second purchaser, who had not obtained actual or constructive possession, was in the same position as the original buyer, and got his title defeasible on non-payment of the price by the latter.⁴⁹ Nor is such second person in a better position by reason of the transfer to him of a delivery order or other document the transfer of which does not operate as a delivery of the goods, unless he obtains an actual or constructive delivery from the warehouseman before the original seller has countermanded the authority and asserted his lien.⁵⁰

On the other hand, the seller may be estopped from asserting his lien by assenting to the subsale, either subsequently⁵¹ or

⁴⁴ Ante, p. 94. See Sales Act, § 56 (1) (a). Cf. Sale of Goods Act, § 43 (1) (a).

⁴⁵ Post, p. 322.

⁴⁶ Ante, p. 162. *McDonald Cotton Co. v. Mayo* (Miss.) 38 South. 372. See Sales Act, § 53 (2).

⁴⁷ *Dixon v. Yates*, 5 Barn. & Adol. 313; *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; *Milliken v. Warren*, 57 Me. 46; *Haskell v. Rice*, 11 Gray (Mass.) 240, 241; *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232; *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. 620. See Sales Act, § 62.

⁴⁸ Ante, p. 27.

⁴⁹ *Dixon v. Yates*, 5 Barn. & Adol. 313.

⁵⁰ *McEwan v. Smith*, 2 H. L. Cas. 309; *Farmeloe v. Bain*, 1 C. P. Div. 445; *Gunn v. Bolckow*, 10 Ch. App. 496; *Keeler v. Goodwin*, 111 Mass. 490; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292.

⁵¹ *Stoveld v. Hughes*, 14 East, 308; *Pearson v. Dawson*, Ell., Bl.

in advance.⁵² Thus when the second purchaser of timber lying on the premises of the original seller informed him of the subsale, and the latter said, "Very well," and allowed him to mark the timber with his name, this was held a sufficient subsequent assent.⁵³ A seller may assent in advance by issuing to the buyer documents of title which contain such representations of fact as will amount to an estoppel against a second purchaser.⁵⁴

Same—Delivery of Part.

Generally speaking, a delivery of a part is not equivalent to a delivery of the whole, so as to destroy the seller's lien. He may give up part, and retain the rest, and maintain a lien on the part retained for the whole price.⁵⁵ But there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of a part operates as delivery of the whole.⁵⁶ If the delivery is to be by installments, and one installment has been delivered,

& El. 448, 27 Law J. Q. B. 248; *Woodley v. Coventry*, 2 Hurl. & O. 164, 32 Law J. Exch. 185; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Voorhis v. Olmstead*, 66 N. Y. 113. But see *Southwestern Freight & Cotton Exp. Co. v. Plant*, 45 Mo. 517. Cf. *Hollins v. Hubbard*, 165 N. Y. 534, 60 N. E. 817.

⁵² *Merchant Banking Co. of London v. Steel Co.*, 5 Ch. Div. 205. Where the original seller showed the goods as the goods of the buyer, without claim of lien, to another, who afterwards bought them, the latter's title was sustained against the seller's assignee in bankruptcy. *Hunn v. Bowne*, 2 Calnes (N. Y.) 38. Cf. *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232.

⁵³ *Stoveld v. Hughes*, 14 East, 308. But the fact that the seller, after notice of a subsale, inquires of the buyer whether he shall ship to the subpurchaser, and asks for a shipping order both from him and from the subpurchaser, does not show a waiver of the lien. *Stoveld v. Hughes*, *supra*, distinguished in *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899.

⁵⁴ *Merchant Banking Co. v. Steel Co.*, 5 Ch. Div. 205.

⁵⁵ *Dixon v. Yates*, 5 Barn. & Adol. 313, 341; *Miles v. Gorton*, 2 Crompt. & M. 504; *Haskell v. Rice*, 11 Gray (Mass.) 240; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504 (stoppage in transitu); *McElwee v. Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232. See *Parks v. Hall*, 2 Pick. (Mass.) 206. A carrier may retain his lien for the whole of his charges, notwithstanding delivery of part. *Potts v. Railroad Co.*, 131 Mass. 455, 41 Am. Rep. 247. See Sales Act, § 55.

⁵⁶ *Benj. Sales*, § 805.

but not paid for, the seller may, at least if the buyer is insolvent, withhold delivery of the others until he has been paid for the installment delivered.⁵⁷ Any installment which has been paid for must be delivered, even though the buyer be bankrupt.⁵⁸

Judgment for Price.

The seller does not lose his lien by obtaining judgment against the buyer for the price, but the lien continues so long as the debt is unpaid.⁵⁹

STOPPAGE IN TRANSITU.

106. When the buyer of goods is⁶⁰ or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would if he had not parted with the possession.⁶¹

107. WHO MAY EXERCISE THE RIGHT. The right of stoppage in transitu may be exercised by an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.⁶²

⁵⁷ *Ex parte Chalmers*, 8 Ch. App. 289. Whether in such case the seller may withhold delivery of the other installments if the buyer is not insolvent seems doubtful. See *Chalm. Sales*, p. 61. This question is to be distinguished from the question whether, if the buyer refuses to pay for one installment, the seller may repudiate the contract. *Ante*, p. 287.

The right to withhold delivery exists as well in a contract to sell as in a sale of specific goods where the property has passed. *Ex parte Chalmers*, supra. And see *Griffiths v. Perry*, 1 El. & El. 280, 28 Law J. Q. B. 204. See *Sales Act*, § 53 (2).

⁵⁸ *Merchant Banking Co. v. Steel Co.*, 5 Ch. Div. 205.

⁵⁹ *Woodland Co. v. Mendenhall*, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 445; *Cragin v. O'Connell*, 50 App. Div. 339, 63 N. Y. Supp. 1071, affirmed 169 N. Y. 573, 61 N. E. 1128; *Honeditch v. Desanges*, 2 Starkle, 337; *Scrivener v. Railway Co.*, 19 Wkly. Rep 288. See *Sales Act*, § 56 (2).

⁶⁰ *Post*, p. 326.

⁶¹ See *Sales Act*, § 57. Cf. *Sale of Goods Act*, 44.

⁶² See *Sales Act*, § 52 (2).

- 108. DURATION OF TRANSIT.**⁵³ Goods are deemed to be in transit from the time they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until—
- (a) The buyer or his agent in his behalf takes delivery of them from such carrier or other bailee; or
 - (b) The buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination; or
 - (c) After the arrival of the goods at their appointed destination, the carrier or other bailee attorns to the buyer, and continues in possession of them as bailee for the buyer; or
 - (d) The carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.
- 109. HOW THE RIGHT IS EXERCISED.** (1) The unpaid seller may exercise his right of stoppage either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given to the person in actual possession of the goods or his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.
- (2) When notice of stoppage is given by the seller to the carrier or other bailee in possession of the goods, he must redeliver the goods to, or in accordance with the directions of, the seller.⁵⁴
- 109½. HOW THE RIGHT MAY BE DEFEATED.** The right of stoppage in transitu is defeasible, at common law, in one way only, viz. when the goods are represented by a bill of lading, and the buyer, being in possession thereof with the seller's assent, transfers it to a bona fide purchaser for value.

The right of stoppage in transitu is founded upon mercantile rules, and is borrowed from the custom of merchants. The doctrine was first recognized in equity, and was subsequently introduced into the courts of common law.⁵⁵ The right arises only on the insolvency of the buyer, and is based on the plain

⁵³ See Sales Act, § 58.

⁵⁴ See Sales Act, § 59.

⁵⁵ *Gibson v. Carruthers*, 8 Mees. & W. 337, per Lord Abinger; *Blackb. Sales*, 315-317. See, also, *Wiseman v. Vandeputt*, 2 Vern. 203; *Burghall v. Howard*, 1 H. Bl. 365, note.

reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts."⁶⁶ It does not arise until the seller's lien is gone, for it presumes that the seller has parted with the possession as well as the property in goods. It is often said to be a mere extension of the seller's lien;⁶⁷ and, as has been shown,⁶⁸ it is closely analogous to the right of the seller in actual possession to reassert his lien, notwithstanding a previous waiver of it, upon the insolvency of the buyer.

Who may Exercise the Right.

On account of its intrinsic justice, the courts are inclined to look with favor on the right of stoppage in transitu, and to extend the right to any one whose position is substantially analogous to that of an unpaid seller.⁶⁹ The right may be exercised by a consignor or factor who has bought goods for his principal with his own money or credit;⁷⁰ by an agent of the seller to whom the bill of lading has been indorsed;⁷¹ by the seller of an interest in an executory contract;⁷² by a surety who has paid the price;⁷³ by a principal consigning goods to

⁶⁶ *D'Aquila v. Lambert*, 2 Eden, at page 77, 1 Amb. 399, per Lord Northington.

⁶⁷ *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 313, 23 Am. Dec. 607, per Shaw, C. J.

⁶⁸ Ante, p. 313.

⁶⁹ *Benj. Sales*, § 830. See *Sales Act*, § 52 (2).

If A. orders goods of B., who directs C. to ship them on his account to A., and C. does so, the relation of seller and buyer not existing between C. and A., C. cannot stop in transitu upon the insolvency of B. *Memphis & L. R. Co. v. Freed*, 38 Ark. 614. See, also, *Eaton v. Cook*, 32 Vt. 58; *Nelmeyer Lumber Co. v. Railroad Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

⁷⁰ *Felse v. Wray*, 3 East, 93; *Tucker v. Humphrey*, 4 Bing. 516; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272, 275; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *Gossler v. Schepeler*, 5 Daly (N. Y.) 476. Otherwise where an agent having a lien for advances ships at his principal's request to a buyer. *Gwyn v. Railroad Co.*, 85 N. C. 429, 39 Am. Rep. 708. See *Tiffany*, Ag. p. 475.

⁷¹ *Morison v. Gray*, 2 Bing. 260.

⁷² *Jenkyns v. Osborne*, 7 Man. & G. 678, 8 Scott, N. R. 505.

⁷³ *Imperial Bank v. London & St. K. Docks Co.*, 5 Ch. Div. 195 (having regard to the mercantile law amendment act, by which a

his factor, though the factor has made advances or has a joint interest with the consignor.⁷⁴

It may be exercised by an agent who has power to act in behalf of the seller;⁷⁵ but, if the agent acts without authority, it seems that ratification after the buyer has demanded the goods of the carrier is too late.⁷⁶ The right of stoppage is not impaired by partial payment,⁷⁷ or by the receipt of a bill of exchange or other negotiable instrument in conditional payment, even though the seller may have negotiated the bill so that it is outstanding, unmaturing, in the hands of a third person.⁷⁸

Against Whom the Right may be Exercised.

The right may be exercised only against a buyer who is insolvent. Insolvency means general inability to pay one's debts in the usual course of business.⁷⁹ The fact that the buyer has

surety is given the remedies of the creditor). In *Siffken v. Wray*, 6 East, 371, it was held that a mere surety for the buyer had no right to stop in transitu. *Benj. Sales*, § 831.

⁷⁴ *Kinloch v. Craig*, 3 Term R. 119; *Newsom v. Thornton*, 6 East, 17.

⁷⁵ *Whitehead v. Anderson*, 9 Mees. & W. 518; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Reynolds v. Railroad*, 43 N. H. 580.

⁷⁶ *Bird v. Brown*, 4 Exch. 786. Ratification before stoppage is sufficient. *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12. A power of attorney dispatched before the stoppage, which the agent did not receive till afterwards, and of which he was ignorant, was a sufficient ratification. *Hutchings v. Nunes*, 1 Moore, P. C. (N. S.) 243. See *Tiffany*, Ag. p. 77.

⁷⁷ *Felse v. Wray*, 3 East, 93; *Edwards v. Brewer*, 2 Mees. & W. 375.

⁷⁸ *Benj. Sales*, § 835, citing *Felse v. Wray*, 3 East, 93; *Patten v. Thompson*, 5 Maule & S. 350; *Edwards v. Brewer*, 2 Mees. & W. 375; *Miles v. Gorton*, 2 Cromp. & M. 504. See, also, *Hays v. Mouille*, 14 Pa. 43; *Moses v. Rasin* (C. C.) 14 Fed. 772, 774; *Dlem v. Koblit*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531. But see *Arnold v. Delano*, 4 Cush. (Mass.) 33, 39, 50 Am. Dec. 754.

A seller who has received notes in payment for goods in the hands of a carrier is entitled to exercise the right of stoppage in transitu on tendering back the notes, even though they have been negotiated, since the return of the notes unpaid is all the consignee can require. *Brewer Lumber Co. v. Railroad Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

⁷⁹ *Biddlecombe v. Bond*, 4 Adol. & E. 332; *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12, 13; *Benedict v. Schaettle*, 12 Ohio St. 515; *Reynolds v. Railroad*, 43 N. H. 580; *Loeb v. Peters*, 63 Ala.

stopped payment has generally been considered as a matter of course to be such insolvency as to justify stoppage in transitu.⁸⁰

If the seller stops in transitu before the buyer has become insolvent, he does so at his peril; but if, on the arrival of the goods at their destination, the buyer is then insolvent, the premature stoppage will avail for the protection of the seller.⁸¹ The seller may stop for insolvency which existed at the time of the sale, provided he did not then know of it.⁸²

The right of stoppage is paramount to the claims of all persons claiming under the buyer, except against one who claims the goods by virtue of a transfer for value of the bill of lading;⁸³ and it is therefore superior to the rights of a creditor of the buyer who attaches the goods while in transit.⁸⁴ It is subject, however, to the lien of the carrier for his charges on the goods.⁸⁵ The right of stoppage is simply against the goods,

243, 35 Am. Rep. 17; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 324; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113; *Jeffris v. Railroad Co.*, 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919. But see *Millard v. Webster*, 54 Conn. 415, 8 Atl. 470 (the inability of the buyer to pay all his debts, if his creditors had pressed for payment, does not show insolvency). Definition of insolvency, see *Sales Act*, § 76 (3).

⁸⁰ *Dixon v. Yates*, 5 Barn. & Adol. 313; *Bird v. Brown*, 4 Exch. 786; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284. It is enough if it be shown that the seller would have had no prospect of receiving payment when the debt should fall due. *Bloomington v. Railroad Co.*, 6 Lea (Tenn.) 616.

⁸¹ *The Constantia*, 6 C. Rob. Adm. 321, per Lord Stowell.

⁸² *Reynolds v. Railroad*, 43 N. H. 580; *Benedict v. Schaettle*, 12 Ohio St. 515; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Kingman v. Denison*, 84 Mich. 608, 43 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711. Contra: *Rogers v. Thomas*, 20 Conn. 54. See *Sales Act*, § 57 ("when the buyer of the goods is or becomes insolvent.")

⁸³ Post, p. 333. See *Sales Act*, § 62.

⁸⁴ *Smith v. Goss*, 1 Camp. 282; *Hays v. Mouille*, 14 Pa. 48; *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 South. 175, 54 Am. St. Rep. 114.

⁸⁵ *Potts v. Railroad Co.*, 131 Mass. 455, 41 Am. Rep. 247; *Hays v. Mouille*, 14 Pa. 48; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84. But the carrier cannot assert a lien for a general balance be-

and hence does not extend to insurance money due to the buyer for damage to the goods.⁸⁶

Meaning of "Transit."

The right of stoppage in transitu does not arise unless the seller has transferred the property and the right of possession to the buyer, and the actual possession to the carrier.⁸⁷ The essential feature of stoppage in transitu is that the goods shall be at the time in the possession of a middleman, or of some person intervening between the seller, who has parted with, and the buyer, who has not yet received, them.⁸⁸ Whether there is a transitus at all will depend, therefore, on whether there is a delivery of the goods by the seller to an intermediary for the purpose of transmission to the buyer. If the delivery is directly to the buyer, or to a servant or agent authorized to accept delivery, who is to hold the goods for him or to deliver them subject to his further orders, no transitus arises.

Delivery on Buyer's Ship.

As a rule, if the buyer sends his own servant for the goods, delivery to him is delivery to the master, and if he sends his own cart or ship, delivery into the cart or on board the ship is prima facie delivery to the buyer,⁸⁹ though, even where he sends his own ship, the seller may restrain the effect of the delivery by taking from the captain a bill of lading to his own order,⁹⁰ in which case, as we have seen,⁹¹ the property does not

tween himself and the consignee. *Oppenheim v. Russell*, 3 Bos. & P. 42; *Pennsylvania R. Co. v. Oil Works*, 126 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885. Where a creditor of the buyer attaches in transit, the seller, though he may still stop the goods, must pay the freight money advanced by the creditor. *Greve v. Dunham*, 60 Iowa, 108, 14 N. W. 130.

⁸⁶ *Berndtson v. Strang*, 3 Ch. App. 588, 591.

⁸⁷ See *Gibson v. Carruthers*, 8 Mees. & W. 321, 334, per Parke, B.; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607, per Shaw, C. J.

⁸⁸ *Schotsmans v. Railway Co.*, 2 Ch. App. 332, per Lord Cairns. See, also, *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50 (logs being driven by log-driving company). See Sales Act, § 58 (1) (a).

⁸⁹ *Van Casteel v. Booker*, 2 Exch. 691; *Berndtson v. Strang*, L. R. 4 Eq. 481, at page 489.

⁹⁰ *Van Casteel v. Booker*, 2 Exch. 691; *Turner v. Trustees*, 6 Exch. 543, 20 Law J. Exch. 394; *Gossler v. Schepeler*, 5 Daly (N. Y.) 478.

⁹¹ Ante, p. 162.

pass, and the seller retains, not strictly speaking the right of stoppage in transitu, but the property. It has been held, however, in England and in Pennsylvania, that if by the terms of the bill of lading the goods are deliverable to the buyer or his assigns, delivery on the buyer's own ship is delivery to him, and therefore precludes any right of stoppage in transitu;⁸² although a distinction is made between a ship owned by the buyer and one merely chartered by him.

In the case of a chartered vessel, it is a question, depending on the circumstances of the particular case, whether the goods are in the possession of the master as a carrier, or as agent of the buyer.⁸³

In this country the courts of several states have refused to recognize a different rule as applying to a ship owned by the buyer.⁸⁴ "The true distinction," says Parsons, C. J., in an early Massachusetts case,⁸⁵ "is whether any actual possession by the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bill of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stoppage in transitu remains after the shipment. * * * The same rule must govern if the consignor be such owner. If the goods are delivered on board his ship, to be carried to him, an actual possession by him after the delivery is provided for by the terms of the instrument; but, if the goods are put on board the ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bill of lading." The distinction here drawn is,

⁸² *Schotsmans v. Railway Co.*, 2 Ch. App. 332; *Bolin v. Hufnagle*, 1 Rawle (Pa.) 9; *Thompson v. Stewart*, 7 Phila. (Pa.) 187.

⁸³ *Bohtlingk v. Inglis*, 3 East, 381; *Berndtson v. Strang*, L. R. 4 Eq. 481, 3 Ch. App. 588; *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 560; *Brindley v. Slate Co.* (1886) 55 Law J. Q. B. Div. 68; *Benj. Sales*, § 843. See *Sale of Goods Act*, § 45 (5), followed *Sales Act*, § 58 (3).

⁸⁴ *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Cross v. O'Donnell*, 44 N. Y. 661, 666, 4 Am. Rep. 721, per *Earle, J.* But see *Sturtevant v. Orser*, 24 N. Y. 538, 539, 82 Am. Dec. 321.

⁸⁵ *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63.

in effect, between delivery to the master, not as the servant of the buyer, but as an intermediary for the purpose of conveying the goods to him, and delivery on board the ship as the place of delivery appointed by him. In the one case the seller may stop in transitu; in the other no transitus ever arises. This distinction is reasonable and in accordance with that recognized in respect to the termination of the transit, viz., that delivery to an agent to convey the goods to the buyer does not terminate the transit, but that delivery to an agent to hold the goods subject to his further orders does terminate it.⁹⁹ That no transitus ever arises where the goods are delivered on board the ship as the place of delivery appointed by the buyer has been recognized on both sides of the Atlantic. Such is the character of the delivery where the buyer orders the goods put on board in order that they may be sent on a mercantile venture or roving voyage,⁹⁷ or in order that they may be shipped from his place of business, not to be delivered to him or to his use, but to a third person.⁹⁸

Termination of Transit—Delivery to Buyer.

"Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance."⁹⁹ The fact that the journey is at an end, and that the carrier is holding the goods as warehouseman, does not show that the transit is ended.¹⁰⁰ The transit does not terminate until the goods pass into the actual or constructive possession of the buyer.¹⁰¹ So long as the buyer declines or fails to take

⁹⁹ Post, p. 331.

⁹⁷ Fowler v. McTaggart, cited in Hodgson v. Loy, 7 Term R. 442; Berndtson v. Strang, L. R. 4 Eq. 481, at page 489.

⁹⁸ Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

⁹⁹ Kemp v. Falk, 7 App. Cas., at page 588, per Lord Fitzgerald.

¹⁰⁰ Farrell v. Railroad Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; Jeffris v. Railroad Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. Rep. 919; Brewer Lumber Co. v. Railroad Co., 179 Mass. 228, 60 N. E. 549, 54 L. R. A. 435, 88 Am. St. Rep. 375.

¹⁰¹ Whitehead v. Anderson, 9 Mees. & W. 518; Crawshaw v. Eades, 1 Barn. & C. 181; Kitchen v. Spear, 30 Vt. 545; Seymour v. Newton, 105 Mass. 272; White v. Mitchell, 38 Mich. 390; Greve v.

delivery the transit continues.¹⁰² What will amount to a taking of possession is a question in relation to which much of the law referred to in connection with actual receipt under the statute of frauds¹⁰³ and delivery in performance of the contract¹⁰⁴ will be found applicable. As in the case of the seller's lien, a mere delivery of a part does not amount to a delivery of the whole, so as to defeat the seller's right as to the remainder, unless the delivery is made under such circumstances as to show an agreement to give up the whole of the goods.¹⁰⁵ The buyer may anticipate the end of the transit, and thereby put an end to the right of stoppage, by taking the goods into his actual possession before they reach their appointed destination.¹⁰⁶

Same—Delivery after Bankruptcy.

The bankruptcy of the buyer not being a rescission of the contract, delivery to him after bankruptcy, or to his trustee or assignee in bankruptcy, terminates the transit.¹⁰⁷ If the property has passed, and the goods have come into the possession of

Dunham, 60 Iowa, 108, 14 N. W. 130; *Symms v. Schotten*, 35 Kan. 310, 10 Pac. 828.

¹⁰² *Bolton v. Railway Co.*, L. R. 1 C. P. 431; *James v. Griffin*, 2 Mees. & W. 623; *Jenks v. Fulmer*, 160 Pa. 527, 28 Atl. 841; *Kingman & Co. v. Denison*, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711; *Mason v. Wilson*, 43 Ark. 172; *Wheeling & L. E. R. Co. v. Koontz*, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435. See Sales Act, § 58 (1) (b).

¹⁰³ Ante, p. 93 et seq.

¹⁰⁴ Ante, p. 269 et seq.

¹⁰⁵ *Bolton v. Railway Co.*, L. R. 1 C. P., at page 440; *Ex parte Cooper*, 11 Ch. Div. 68; *Kemp v. Falk*, 7 App. Cas., at page 589, per Lord Blackburn; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504. Cf. ante, p. 321. See, also, *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50. See Sales Act, § 58 (4).

¹⁰⁶ *Whitehead v. Anderson*, 9 Mees. & W. 518, 534; *London & N. W. Ry. Co. v. Bartlett*, 7 Hurl. & N. 400, 31 Law J. Exch. 92; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 638; *Mohr v. Railroad Co.*, 106 Mass. 72, per Morton, J.; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270. Cf. *Poole v. Railway Co.*, 58 Tex. 134. See Sales Act, § 58 (2) (a); Sale of Goods Act, § 45 (2).

¹⁰⁷ *Ellis v. Hunt*, 3 Term R. 467; *Inglis v. Usherwood*, 1 East, 515; *Conyers v. Ennis*, 2 Mason (U. S.) 236, Fed. Cas. No. 3,149; *Millard v. Webster*, 54 Conn. 415, 8 Atl. 470; *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110; *Felix v. Brandstetter Co.* (Iowa) 89 N. W. 971.

the insolvent buyer, he cannot afterwards rescind the sale, and thus give a preference to the seller over the general creditors.¹⁰⁸ But before the goods have come into his possession he may, with the assent of the seller, rescind the sale, or else refuse to take possession, and thus leave unimpaired the right of stoppage in transitu, unless his assignee succeeds in getting possession before the right is exercised.¹⁰⁹

Same—Delivery to Agent.

Delivery of the goods at their appointed destination to an agent authorized to receive delivery is delivery to the buyer, and ends the transit. But delivery to his agent before they have reached their destination does not necessarily end the transit.

The goods may be in transit although they have left the hands of the person to whom the seller intrusted them for transmission; it is immaterial how many agents they may have passed through, if they have not reached their destination. The term "transit" does not necessarily imply that the goods are in motion. "If the goods are deposited with one who holds them merely as agent to forward, and has custody as such, they are as much in transitu as if they were actually moving."¹¹⁰ Thus goods may still be in transitu, though lying in a warehouse to which they have been sent by the seller's orders. Goods sold in Chicago to a merchant in Liverpool, and lying in a warehouse in New York awaiting shipment to Liverpool in pursuance of

¹⁰⁸ *Barnes v. Freeland*, 6 Term R. 80.

¹⁰⁹ *Atkin v. Barwick*, 1 Strange, 165; *Salte v. Field*, 5 Term R. 211; *Grout v. Hill*, 4 Gray (Mass.) 361; *Tufts v. Sylvester*, 79 Me. 213, 9 Atl. 357, 1 Am. St. Rep. 303; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321; *Cox v. Burns*, 1 Iowa, 64; *Mason v. Willson*, 43 Ark. 172.

¹¹⁰ *Smith v. Goss*, 1 Camp. 282; *Ex parte Watson*, 5 Ch. Div. 35; *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 560; *Bethell v. Clark*, 19 Q. B. Div. 553, affirmed 20 Q. B. Div. 615; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Harris v. Pratt*, 17 N. Y. 249; *Cabeen v. Campbell*, 30 Pa. 254; *Aguirre v. Parmelee*, 22 Conn. 473; *White v. Mitchell*, 38 Mich. 390; *Blackman v. Pierce*, 23 Cal. 509; *Weber v. Baessler*, 3 Colo. App. 459, 84 Pac. 261; *In re Burke & Co. (D. C.)* 140 Fed. 971; *Frame v. Liquor Co. (Or.)* 85 Pac. 1009; *Id.*, 48 Or. 272, 86 Pac. 791. *Blackb. Sales*, 353.

the buyer's original order to send them to Liverpool, are still in transit, even though the person in possession may be the general agent of the buyer for selling as well as for forwarding the goods. But if the goods are once deposited with one who holds them as agent of the buyer, subject to his further orders, they are no longer in transit.¹¹¹ In each case the question is: "Has the person who has the custody of the goods got possession as an agent to forward from the vendor to the buyer, or as an agent to hold for the buyer?"¹¹² It is often impossible to reconcile the decisions in cases arising upon substantially similar facts. The difficulty lies, not in the statement, but in the application, of the principles.

Same—Attornment of Carrier.

When the goods have reached their appointed destination, the transitus may be terminated by a constructive as well as by an actual delivery of possession to the buyer. Unless there be a delivery of actual possession, something must occur to change the actual possession of the carrier into the constructive possession of the buyer; in other words, the carrier must attorn—that is, acknowledge to the buyer that he holds the goods on his behalf.¹¹³ As in other cases, the attornment must be founded on mutual assent.¹¹⁴ If the carrier does not consent to

¹¹¹ *Dixon v. Baldwin*, 5 East, 175; *Valpy v. Gibson*, 4 C. B. 837; *Ex parte Gibbes*, 1 Ch. Div. 101; *Kendal v. Marshall*, 11 Q. B. Div. 356; *Ex parte Miles*, 15 Q. B. Div. 39, 54 Law J. Q. B. 567; *Gulford v. Smith*, 30 Vt. 49; *Becker v. Hallgarten*, 86 N. Y. 167; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 313, 23 Am. Dec. 607; *Biggs v. Barry*, 2 Curt. (U. S.) 259, Fed. Cas. No. 1,402; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442, 447.

If the carrier or other bailee has attorned to the buyer, "it is immaterial that a further destination for the goods may have been indicated by the buyer." Sales Act, § 58 (2) (b).

¹¹² Blackb. Sales, 353.

¹¹³ See Sales Act § 58 (2) (b).

¹¹⁴ *James v. Griffin*, 2 Mees. & W. 623; *Ex parte Cooper*, 11 Ch. Div. 68; *Kemp v. Falk*, 7 App. Cas. 573, per Lord Blackburn; *Hall v. Dimond*, 63 N. H. 565, 3 Atl. 423; *McFetridge v. Piper*, 40 Iowa, 627; *Harding Paper Co. v. Allen*, 65 Wis. 576, 27 N. W. 329; *Langstaff v. Stix*, 64 Miss. 171, 1 South. 97, 60 Am. Rep. 49; *Williams v. Hodges*, 113 N. C. 36, 18 S. E. 83; Blackb. Sales, 364.

hold the goods as bailee for the buyer,¹¹⁵ or if the buyer does not assent to his so holding them,¹¹⁶ there is no attornment.

The carrier's change of character into that of warehouseman or bailee for the buyer is not necessarily inconsistent with his maintenance of his carrier's lien;¹¹⁷ but the continuance of the lien, and the fact that his charges are unpaid, is strong, though not conclusive, evidence that he is still in possession as carrier.¹¹⁸

Wrongful Refusal to Deliver.

Since the buyer has the right of possession subject only to the right of stoppage in transitu, if the buyer is solvent or the seller has failed to exercise his right of stoppage the buyer's right of possession is not affected by the refusal of the carrier to deliver; and, if the carrier wrongfully refuses possession, the right of stoppage is gone.¹¹⁹

How the Right may be Defeated.

The seller may stop in transit notwithstanding that he has delivered to the buyer a bill of lading by which the goods are deliverable to his order. But if the buyer transfers the bill of lading to a bona fide purchaser for value, and in such case only, the right of stoppage is defeated.¹²⁰ It must be borne in mind,

¹¹⁵ *Whitehead v. Anderson*, 9 Mees. & W. 518; *Coventry v. Gladstone*, L. R. 6 Eq. 44.

¹¹⁶ *Ex parte Barrow*, 6 Ch. Div. 783; *O'Neil v. Garrett*, 6 Iowa, 480.

¹¹⁷ *Allan v. Gripper*, 2 Crompt. & J. 218; *Hall v. Dimond*, 63 N. H. 565, 3 Atl. 423.

¹¹⁸ *Kemp v. Falk*, 7 App. Cas. 573, per Lord Blackburn. Where the captain promised to deliver, when satisfied as to freight, it was held the transit was not ended. *Whitehead v. Anderson*, 9 Mees. & W. 518.

¹¹⁹ *Bird v. Brown*, 4 Exch. 786. See Sales Act, 58 (2) (c).

¹²⁰ *Lickbarrow v. Mason*, 2 Term R. 63, 1 H. Bl. 357, 2 H. Bl. 211, 6 East, 20, note, 5 Term R. 683, 1 Smith Lead. Cas. (Ed. 1887) 737, and notes. See, also, *Branan v. Railroad Co.*, 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26; *Delta Bag Co. v. Kearns*, 112 Ill. App. 269; *Benj. Sales*, § 862.

Plaintiff sold lumber to T., and T. sold it to defendant, whereupon plaintiff shipped it, in Ottawa, to defendant, in New York, on bills of lading naming defendant as consignee, and sent the bills to T. Held, that T. received the bills for defendant, and no further transfer of the bills was necessary to enable defendant, as pur-

however, that a bill of lading is not like a bill of exchange, and that the transferee obtains no greater rights under the instrument than his transferor possessed. The bill of lading represents the goods, and the transfer of the instrument operates simply as a delivery of the goods. Therefore the transfer by one who has no title to the goods conveys none to the transferee, and a transfer of the bill of lading by way of pledge by one who, like a factor, has no authority to pledge confers no greater rights than would the pledge of the goods themselves by an agent acting without authority.¹²¹

To entitle the transferee to hold the goods free from the right of stoppage in transitu, he must take without notice; not, indeed, without notice that the goods have not been paid for, since that would not affect the buyer's right to sell, but without notice of the buyer's insolvency,¹²² or of any other circumstance which would render the bill of lading not fairly and honestly assignable.¹²³

It has been held in one case ¹²⁴ that a bona fide transferee of the bill of lading for value will be protected, although the transfer was after notice of stoppage had been given to the carrier. The decision was placed upon the ground that on the assignment of the bill of lading the legal title passes to the bona fide purchaser for value, and that, whether the assignment is after or before the notice of stoppage is given, the equities of the

chaser, to defeat plaintiff's right of stoppage in transitu for the insolvency of T. Shepard & Morse Lumber Co. v. Burroughs, 62 N. J. Law, 469, 41 Atl. 695.

A bona fide purchaser's title is unassailable as against the seller, notwithstanding the buyer's fraud. National Bank of Bristol v. Railroad Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

¹²¹ Lickbarrow v. Mason, 1 Smith, Lead. Cas. (Ed. 1887) 737, notes. In some states bills of lading are by statute made negotiable, like bills of exchange and promissory notes. Ante, p. 35.

¹²² Vertue v. Jewell, 4 Camp. 81, per Lord Ellenborough; Stanton v. Eager, 16 Pick. (Mass.) 467, 476; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; First Nat. Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479.

¹²³ Cumling v. Brown, 9 East, 506; Salomons v. Nissen, 2 Term R. 681. See, also, Shepard & Morse Lumber Co. v. Burroughs, 62 N. J. Law, 469, 41 Atl. 695; Wheeling & L. E. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

¹²⁴ Newhall v. Railroad Co., 51 Cal. 345, 21 Am. Rep. 718.

purchaser are superior to those of the seller, whose lien notwithstanding the notice "continues to be only a secret trust as to a person who * * * takes an assignment of the bill of lading 'without notice of such circumstances as renders the bill of lading not fairly and honestly assignable.'" The opinion concludes: "If a person, taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated." This case has been criticised,¹²⁵ but it has been followed by the proposed Sales Act,¹²⁶ which provides: "If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu."

The transfer must be for value, but an antecedent debt is sufficient.¹²⁷ The purchaser will, however, take subject to the

¹²⁵ *Burdick*, Sales (2d Ed.) 251; *Mechem*, Sales, § 1567; *Hutchinson*, Carriers, § 414.

¹²⁶ Section 62. Cf. section 59 (2). Prof. Williston, in his note to section 62, says: "It seems clearly better to limit the right of stoppage in transitu of a seller who has intrusted the buyer with a perfect apparent title than to deprive the innocent purchaser of the goods."

¹²⁷ *Leask v. Scott*, 2 Q. B. Div. 376, dissenting from *Rodger v. Comptoir d'Escompte*, L. R. 2 P. C. 393; *St. Paul Roller-Mill Co. v. Dispatch Co.* (C. C.) 27 Fed. 434; *Lee v. Kimball*, 45 Me. 172; *First Nat. Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479 (security for antecedent debt); *Shepard & Morse Lumber Co. v. Burroughs*, 62 N. J. Law, 469, 41 Atl. 695. See, also, *Clementson v. Railway Co.*, 42 U. C. Q. B. 263. But it has been held that a transfer of the bill of lading, as mere collateral to previous obligations, does not defeat the seller's right. *Lesassier v. The Southwestern*, 2 Woods (U. S.) 85, Fed. Cas. No. 8,274; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17. See Sales Act, § 76 (1), meaning of "value."

right of stoppage, unless he actually gets a transfer of the bill of lading.¹²²

The right of stoppage may be defeated in part by a transfer of the bill of lading by way of pledge or mortgage. In such case, the buyer still retains the general property, and the seller may in equity exercise his right of stoppage subject to the incumbrance; and he may also compel the incumbrancer to exhaust any other securities he may hold in satisfaction of his claim before proceeding on the goods represented by the bill of lading.¹²³

Whether, when the bill of lading has been transferred by the buyer to a subpurchaser for value, but the purchase money is wholly or in part unpaid by the subpurchaser, the seller may stop to the extent of such unpaid purchase money, is a question not free from doubt.¹²⁴

¹²² *Kemp v. Falk*, 7 App. Cas. 573, per Lord Blackburn; *Walter v. Ross*, 2 Wash. C. C. (U. S.) 283, Fed. Cas. No. 17,122; *Stanton v. Eager*, 16 Pick. (Mass.) 467, 476; *Pattison v. Culston*, 33 Ind. 240, 5 Am. Rep. 199; *Clapp v. Sohmer*, 55 Iowa, 273, 7 N. W. 639. The transfer of a "duplicate" bill of lading does not defeat the right of stoppage. *Castanola v. Railroad Co.* (D. C.) 24 Fed. 267. But see note to that case by Adelbert Hamilton, citing *Caldwell v. Ball*, 1 Term R. 205; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661, L. R. 4 H. L. 317; *Glyn v. Dock Co.*, 7 App. Cas. 591, affirming 6 Q. B. Div. 475, reversing 5 Q. B. Div. 129; *Benj. Sales*, § 861. Cf. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

¹²³ *In re Westzinthus*, 5 Barn. & Adol. 817; *Spalding v. Ruding*, 6 Beav. 376, 12 Law J. Ch. 503, affirmed 15 Law J. Ch. 374; *Berndtson v. Strang*, L. R. Eq. 481, affirmed 3 Ch. App. 588; *Kemp v. Falk*, 7 App. Cas. 573. Cf. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861. But if the goods come into the hands of pledgees of the buyer, holding them under his title and setting up a possession adverse to that of the seller with the buyer's assent, at a place where the seller contemplated and agreed it should be done, the transit is at an end, and the principle of *Spalding v. Ruding* does not apply. *Brooke Iron Co. v. O'Brien*, 135 Mass. 442, 447.

¹²⁴ The affirmative was substantially held in *Ex parte Golding*, 13 Ch. Div. 628, which was followed in *Ex parte Falk*, 14 Ch. Div. 446. The latter case was affirmed, but on a different ground (7 App. Cas. 573), where Lord Selbourne doubted the rule, and said: "I assent entirely to the proposition that, where the subpurchasers get a good title as against the right of stoppage in transitu, there can be no stoppage in transitu as against the purchase money payable by

How Stoppage in Transitu is Effected.

It has been said that the vendor is so much favored in exercising his right as to be justified in getting the goods back by any means not criminal before they reach the possession of the insolvent vendee.¹³¹ "The law is clearly settled," says Parke, B., "that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come into the actual or constructive possession of the vendee."¹³²

Any notice clearly countermanding delivery is enough. Such notice may be given to the person in actual possession of the goods or to his principal or employer.¹³³ But, if the notice be to a principal not in actual possession, the notice, to be effectual, must be given at such time and under such circumstances that the principal, in the exercise of reasonable diligence, can communicate with his servant or agent in time to prevent delivery to the buyer; but if the principal receives notice he is bound to use reasonable diligence in forwarding the notice to the proper agent, and if he does so he will be excused if the goods are delivered before the arrival of the notice.¹³⁴

The seller exercises his right of stoppage at his peril. When notice of stoppage is lawfully given to the carrier, the latter must redeliver the goods according to the directions of the

them to their vendor." See *Benj. Sales*, § 865a; *Chalm. Sale of Goods Act* (6th Ed.) p. 98.

¹³¹ *Snee v. Prescott*, 1 Atk. 245, 250, per Lord Hardwicke.

¹³² *Whitehead v. Anderson*, 9 Mees. & W. 518. See *Sales Act*, § 59 (1).

¹³³ *Litt v. Cowley*, 7 Taunt. 169; *Reynolds v. Railroad*, 43 N. H. 580; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Rucker v. Donovan*, 13 Kan. 252, 19 Am. Rep. 84. The notice need not state the reason. *Allen v. Railroad Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310. The seller may exercise his right by demanding the bills of lading from the shipowner who has retained them as security. *Ex parte Watson*, 5 Ch. Div. 35. But a notice to hold the proceeds of the goods is ineffectual. *Phelps v. Comber*, 29 Ch. Div. 813.

¹³⁴ *Whitehead v. Anderson*, 9 Mees. & W. 518; *Kemp v. Falk*, 7 App. Cas. 573, 585, per Lord Blackburn; *Mottram v. Heyer*, 5 Denlo (N. Y.) 629. Cf. *Ex parte Falk*, 14 Ch. Div. 446, 455, per Bramwell, L. J. See *Sales Act*, § 59 (1).

seller.¹⁸⁶ In case of real doubt, the carrier must deliver at his peril or resort to an interpleader.¹⁸⁶

Effect of Stoppage in Transitu.

The effect of exercising the right is simply to restore the goods into the possession of the seller, so as to enable him to exercise his rights as unpaid seller, and not to rescind the sale. He is replaced in the position he was in before he parted with the possession.¹⁸⁷

¹⁸⁶ *The Tigress*, 32 Law J. P. M. & Adm. 97; *The E. H. Pray* (D. C.) 27 Fed. 474; *The Vidette* (D. C.) 34 Fed. 396; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338; *Allen v. Railroad Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310. See Sales Act, § 59 (2), which adds a proviso not in the Sale of Goods Act (section 46): "If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document of title is first surrendered for cancellation." In his note to this section Prof. Williston says: "The carrier should be liable to a bona fide transferee of its bill of lading, and unquestionably would be at common law if the transferee took for value before the stoppage. Even though the transferee took after the notice of stoppage, he is protected by section 62. The carrier, therefore, ought not to be obliged or allowed to surrender the goods unless the document of title is surrendered."

¹⁸⁶ *Glyn v. Dock Co.*, 7 App. Cas. 591, per Lord Blackburn; *The Tigress*, 32 Law J. P. M. & Adm. 97, 102; *Benj. Sales*, § 861.

¹⁸⁷ *Martindale v. Smith*, 1 Q. B. 389; *Wentworth v. Outhwaite*, 10 Mees. & W. 436; *Schotsmans v. Railway Co.*, 2 Ch. App. 332, 340, per Lord Cairns; *Kemp v. Falk*, 7 App. Cas. 573, 581, per Lord Blackburn; *Babcock v. Bonnell*, 80 N. Y. 244; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 312, 23 Am. Dec. 607; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Patten's Appeal*, 45 Pa. 151, 84 Am. Dec. 479; *Pennsylvania R. Co. v. Oil Works*, 128 Pa. 485, 17 Atl. 671, 12 Am. St. Rep. 885; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *Bloomington v. Railroad Co.*, 6 Lea (Tenn.) 616; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *McGill v. Lumber Co.*, 111 Tenn. 552, 82 S. W. 210.

Where a seller of grain, on learning that the buyer is insolvent and intends to get possession with intent to defraud, elects to rescind the sale and stops the grain in transit, he cannot thereafter claim that by the stoppage he acquired a lien for the price as against one to whom the bills of lading had been transferred by the buyer as collateral. *Kearney Milling & El. Co. v. Railway Co.*, 97 Iowa, 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

RIGHT OF RESALE

110. Where the buyer has been in default an unreasonable time, the unpaid seller, who has a right of lien or has exercised his right of stoppage in transitu, may resell the goods, and, if the goods sell for less than the contract price, may recover from the buyer damages for any loss occasioned by the breach of the contract of sale.

In England.

In England the exact extent of the right of the unpaid seller in possession of the goods to resell them upon the buyer's default has not been free from doubt. The following summary of the points established by the cases is taken from a recent work:¹³⁸ "(1) A seller may, without express power (at any rate if he gives notice of resale), resell the goods when the buyer by his words or conduct absolutely refuses to pay for them.¹³⁹ (2) Simple nonpunctuality in payment does not justify a resale.¹⁴⁰ (3) When the power of resale is an express one, the seller resells as owner.¹⁴¹ (4) Whether the power of resale be an express one, or not, (a) the buyer, who has not absolutely refused to pay, cannot treat the contract as rescinded by the resale;¹⁴² (b) the seller cannot, after a resale, recover the price of the goods, but he may recover damages for the buyer's breach."¹⁴³ The subject is now regulated by the Sale of Goods Act.¹⁴⁴

In the United States.

In this country the right of resale is universally recognized and on the whole clearly defined.

¹³⁸ Benj. Sales (5th Eng. Ed.) 949.

¹³⁹ Citing *McLean v. Dunn*, 4 Bing. 722; *Fitt v. Cassanet*, 12 Law J. C. P. 70, 4 Man. & G. 898; *Cornwall v. Hanson* (1899) 2 Ch. 10, reversed in C. A. (1900) 2 Ch. 298.

¹⁴⁰ Citing *Martindale v. Smith*, 1 Q. B. 389; *Woolfe v. Horne*, 2 Q. B. Div. 355.

¹⁴¹ Citing *Lamond v. Davall*, 9 Q. B. 1030.

¹⁴² Citing *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127, 145, 146; *McLean v. Dunn*, *supra*.

¹⁴³ Citing *Chinery v. Viall*, 5 Hurl. & N. 288; *McLean v. Dunn*, *supra*.

¹⁴⁴ Section 48.

Where the buyer has been in default in the payment of the price an unreasonable time, the unpaid seller, who has a right of lien or has exercised his right of stoppage in transitu, may resell the goods, and, if they sell for less than the contract price, may recover the difference, together with the expenses of the sale, in an action against the buyer.¹⁴⁵

It is usually said that in making the sale the seller acts as the buyer's agent,¹⁴⁶ but the expression is inaccurate; for the seller does not act as agent in any proper sense, but for himself in the exercise of a remedy conferred by law.¹⁴⁷ The duties of the seller in making the sale are, indeed, similar to those of an agent in selling for his principal. It must appear that the sale was made within a reasonable time,¹⁴⁸ and that it was fairly conducted.¹⁴⁹ Whether the sale should be private

¹⁴⁵ *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Dustan v. McAndrew*, 44 N. Y. 73; *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *Whitney v. Boardman*, 118 Mass. 242; *Phelps v. Hubbard*, 51 Vt. 489; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Young v. Mertens*, 27 Md. 114; *Bell v. Offutt*, 10 Bush. (Ky.) 632; *Bagley v. Findlay*, 82 Ill. 524; *Roebbling's Sons' Co. v. Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Van Horn v. Rucker*, 33 Mo. 391, 84 Am. Rep. 52; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531. See Sales Act, § 60 (1). Upon default of a purchaser of an undivided interest in a partnership, the vendor may resell and recover the deficiency from the first purchaser. *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415.

¹⁴⁶ See *Sands v. Taylor*, *supra*, and cases in preceding note.

¹⁴⁷ *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692. The seller is entitled to any excess over the contract price realized on the resale. *Bridgford v. Crocker*, 60 N. Y. 627.

¹⁴⁸ *Smith v. Pettee*, 70 N. Y. 13; *Camp v. Hamlin*, 55 Ga. 259; *Pickering v. Bardwell*, 21 Wis. 563. See *Rosenbaums v. Weeden*, 18 Grat. (Va.) 785, 98 Am. Dec. 737. If goods are perishable, they may be sold forthwith. *Tustin Fruit Ass'n v. Fruit Co. (Cal.)* 53 Pac. 693.

¹⁴⁹ *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415; *Camp v. Hamlin*, 55 Ga. 259; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657; *Saladin v. Mitchell*, 45 Ill. 79; *Penn v. Smith*, 98 Ala. 560, 12 South. 818. A sale elsewhere than at the place of delivery is good, if made in good faith, and in the exercise of a reasonable discretion. *Lewis v. Greider*, 51 N. Y. 231; *Sawyer v. Dean*, 114 N. Y. 469, 481, 21 N. E. 1012. But see *Chapman v. Ingram*, 30 Wis. 290; *Rickey v. Tenbroeck*, 63 Mo. 563. The buyer cannot complain that the goods are bought in the name of a third person for

or by auction would depend on what was the customary manner of selling the commodity in question and the manner most likely to produce the best price.¹⁵⁰

Whether notice of intention to exercise the right of resale should be given is a question on which there is much conflict. Many cases hold that notice should be given, unless, owing to the perishable character of the goods or other circumstances, it may properly be dispensed with.¹⁵¹ Other cases hold that no notice is requisite.¹⁵² Notice of the time and place of sale is not essential.¹⁵³

the seller, if the full market price is obtained. *Lindon v. Eldred*, 49 Wis. 305, 5 N. W. 862. It seems that the seller should follow any reasonable instructions as to the time and manner of sale which he can follow without sacrificing his lien. *Smith v. Pettee*, 70 N. Y. 13, 18.

¹⁵⁰ *Pollen v. Le Roy*, 30 N. Y. 549; *Van Brocklen v. Smealie*, 140 N. Y. 70, 35 N. E. 415; *Whitney v. Boardman*, 118 Mass. 242, 248; *Hayes v. Nashville*, 80 Fed. 641, 28 C. C. A. 59. See Sales Act, § 60 (5).

Where by the contract the property was not to pass until the price was paid, and the buyer refused to complete the purchase, and the seller sold at public auction, after opportunity to see the goods, due advertisement, and notice to the buyer, the fact that the seller bid in the goods did not render the sale invalid, and in an action against the buyer for the deficiency the amount realized was lawful evidence of the value. *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728.

¹⁵¹ *Holland v. Rea*, 48 Mich. 218, 224, 12 N. W. 167; *Redmond v. Smock*, 28 Ind. 365; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861; *Leonard v. Portier* (Tex. App.) 15 S. W. 414; *Winslow v. Iron Co.* (Tenn. Ch. App.) 42 S. W. 698; *Davis Sulphur Ore Co. v. Guano Co.*, 100 Ga. 607, 34 S. E. 1011.

¹⁵² *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406; *Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687; *Magnes v. Seed Co.*, 14 Colo. App.

¹⁵³ *Pollen v. Le Roy*, 30 N. Y. 549; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167; *Ullmann v. Kent*, 60 Ill. 271; *Pratt v. Manufacturing Co.*, 115 Wis. 648, 92 N. W. 368. It is not "essential that notice of the time and place of sale should be given to the vendee. Still as the sale must be fair, and such as is most likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit it." *Van Brocklen v. Smealie*, 140 N. Y. 70, 75, 35 N. E. 415, per Finch, J.

Where a resale is made, the buyer acquires a good title as against the original buyer, if the seller had a right to make the sale and the sale is properly made.¹⁵⁴

RIGHT TO RESCIND.

111. By the rule generally prevailing in this country, but not in England, where the buyer has been in default an unreasonable time, the unpaid seller, who has a right of lien or has exercised his right of stoppage in transitu, may keep the goods as his own and recover as damages the difference between the market price at the time and place of delivery and the contract price.

Choice of Remedies—Right to Rescind.

It is held in England that the seller has no right to rescind the sale because the buyer is in default for the price,¹⁵⁵ his choice of remedies, except for the right of lien, being either to sue for the price or to resell. In some cases in this country, it is said that the seller has a third remedy. The vendor of per-

219, 59 Pac. 879. See, also, *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415. See Sales Act, § 60 (3). Prof. Williston, in his note to this section, says: "It seems undesirable to make a resale invalid under all circumstances for lack of notice. The lapse of time or other circumstances might make it highly unjust to allow the buyer later, when, perhaps, market prices had risen, to make such a claim. On the other hand, it seems desirable that notice should generally be given. The provision suggested will have the effect, it is hoped, of making notice necessary, unless the default of the buyer is very clear and long continued."

¹⁵⁴ "In the absence of an express power, the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it; * * * but he must proceed by foreclosure. When a vendor rightfully stops goods in transitu, or retains them before transitus has begun, he can by a sale * * * vest a purchaser with a good title. His right is very nearly that of a pledgee with power to sell at private sale in case of default." *Tuthill v. Skidmore*, 124 N. Y. 148, 153, 28 N. E. 348. See *Milgate v. Kebble*, 3 Man. & G. 100; *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357; *Bowser v. Birdsell*, 49 Mich. 5, 12 N. W. 888. See, also, Sales Act, § 60 (2). Cf. Sales of Goods Act, § 48 (2).

¹⁵⁵ *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee Eduljee*. L. R. 1 P. O. 127. Cf. *Langfort v. Tiler*, 1 Salk. 113. See Sales of Goods Act, § 48; post, p. 345.

sonal property, says the court, in the leading case of *Dustan v. McAndrew*,¹⁸⁶ in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three remedies: (1) He may store or retain the property for the vendee, and sue him for the entire price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price. Substantially the same statement of the law has been made in other cases, although in most of them the exercise of the third remedy was not involved.¹⁸⁷ While the first remedy is exercised in affirmance of the contract, the third, since it permits the seller to keep the goods as his own notwithstanding that the property has passed, must rest on the theory of rescission, although the seller is inconsistently allowed to maintain an action on the contract for the difference between the market value and the price.¹⁸⁸ It is to be said, however, that the right of resale seems also to involve a rescission. A right to rescind is given by the proposed Sales Act, which also provides more fully than has been indicated by the cases how the right may be exercised.¹⁸⁹

¹⁸⁶ 44 N. Y. 73.

¹⁸⁷ *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Van Brocklen v. Smealle*, 140 N. Y. 70, 35 N. E. 415; *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; *Ackerman v. Morris*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Barr v. Logan*, 5 Har. (Del.) 52; *Young v. Mertens*, 27 Md. 114, 126; *Cook v. Brandeis*, 3 Metc. (Ky.) 555; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535. See, also, *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394. If the goods rise in value after the failure to perform, the seller is entitled to the benefit. *Bridgford v. Crocker*, 60 N. Y. 627. See, also, *Nels v. O'Brien*, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894.

¹⁸⁸ Cf. *Ganson v. Madigan*, 15 Wis. 144, 151, 82 Am. Dec. 659. See *Mechem, Sales*, §§ 1681, 1682.

¹⁸⁹ Section 61. See, also, section 53. Prof. Williston observes, in his note to section 61 of the draft, that the remedy "is allowed in this country, and seems fully justified by mercantile custom and convenience."

CHAPTER X.

ACTIONS FOR BREACH OF THE CONTRACT.

- 112. Remedies of Seller—Action for Price.
- 113-114. Action for Damages for Nonacceptance.
- 115. Remedies of the Buyer—Action for Failing to Deliver Goods.
- 116. Specific Performance.
- 117. Recovery upon Failure of Consideration.
- 118. Action for Converting or Detaining Goods.
- 119. Breach of Warranty—Rights before Acceptance.
- 120-121. Rights after Acceptance.

REMEDIES OF THE SELLER—ACTION FOR THE PRICE.¹

- 112. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
- (2) Where, under a contract of sale, the price is payable on a day certain, irrespective of delivery or transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.
- (3) In some jurisdictions in this country, although the property in the goods has not passed, if the seller has tendered to the buyer goods in accordance with the terms of the contract, and the buyer has wrongfully refused to accept them, the seller may keep the goods for the buyer and may maintain an action for the price. In other jurisdictions in this country, this rule is confined to cases where the goods are such that they cannot be readily resold for a reasonable price. In many other jurisdictions in this country, and in England, in all such cases the seller must seek his remedy in an action for damages for nonacceptance.

¹ See Sales Act, § 63. Cf. Sale of Goods Act, § 49.

Where the Property has Passed.

When the property in the goods has passed, unless the sale is on credit or payment is made to depend on some contingency, the seller may maintain an action for the price.² He may recover the price under the common indebitatus counts: When the contract has been completed in all respects except delivery, and delivery is not a condition precedent to the payment of the price, under the count for goods bargained and sold; when the goods have been delivered, and the price is payable at the time of action brought, under the count for goods sold and delivered. If the sale is on credit, he must, of course, await the termination of the credit before bringing suit.³ And if the price is payable by a bill or other security, and the security is not given, the seller cannot sue for the price until the bill would have matured, though he may sue at once for damages for breach of the agreement, in which case the measure of his damages will be *prima facie* the amount of the sum to be secured.⁴

Where the property has passed and the goods have been delivered to the buyer, the seller may not rescind for default in payment of the price, and bring action for the recovery of the goods.⁵

² *Scott v. England*, 2 Dowl. & L. 520; *Stearns v. Washburn*, 7 Gray (Mass.) 187, 189; *Morse v. Sherman*, 106 Mass. 430; *Frazier v. Simmons*, 139 Mass. 531, 535, 2 N. E. 112; *Mitchell v. LeClair*, 165 Mass. 308, 43 N. E. 117; *Hayden v. Demets*, 53 N. Y. 426; *Doremus v. Howard*, 23 N. J. Law, 390; *Armstrong v. Turner*, 49 Md. 589; *Ganson v. Madigan*, 13 Wis. 67; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Olcese v. Fruit & Trading Co.*, 211 Ill. 539, 71 N. E. 1084.

³ *Calcutta & B. Steam Nav. Co. v. De Mattos*, 32 Law J. Q. B. (N. S.) at page 328; *Keller v. Strasberger*, 90 N. Y. 379; *Dellone v. Hull*, 47 Md. 112. Mere insolvency of one of the parties is not equivalent to a rescission or a breach. It simply relieves the seller from his agreement to give credit. *Pardee v. Kanady*, 100 N. Y. 121, 126, 2 N. E. 885. Cf. *New England Iron Co. v. Railroad Co.*, 91 N. Y. 153, 163.

⁴ *Paul v. Dod*, 2 C. B. 800; *Rinehart v. Olwine*, 5 Watts & S. (Pa.) 157; *Hanna v. Mills*, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; *Barron v. Mullin*, 21 Minn. 374; *Young v. Dalton*, 83 Tex. 497, 18 S. W. 819. But see *Foster v. Adams*, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120.

⁵ *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1142; *Neal v. Boggan*, 97 Ala. 611, 11 South. 809; *Benj. Sales*, § 764.

Where Property Has not Passed—Price Payable Absolutely.

If by the terms of the contract the price is payable notwithstanding that the property may remain vested in the seller, the seller may recover the price at the time agreed upon, leaving the buyer to his cross-action in case the seller, after receiving the price, should fail to deliver the goods.* As we have seen, in a conditional sale, the price is payable irrespective of the transfer of the property, and the seller may sue for the price although the property has not passed.⁷

If, however, at the time for payment of the price, the seller has manifested an inability to perform or an intention not to perform the contract on his part, it seems that the buyer will be excused from performing on his part.*

Same—Wrongful Refusal to Accept.

In England,⁸ and in many jurisdictions in this country,¹⁰ it is held that if the property has not passed the seller cannot under any circumstances, unless the price is payable irrespective of the transfer of the property, maintain an action for the price. The goods are still his. His only remedy, therefore, is an action against the buyer to recover damages for nonacceptance; that is, to recover the difference between the value of the goods, which he has, and the price, which was to have been his. In many jurisdictions in this country, however, it is held that, although the property has not passed, if the reason why it has not

* *Dunlop v. Grote*, 2 Car. & K. 153; *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537. See Sales Act, § 63 (2).

⁷ Ante, p. 189.

* See Sales Act, § 63 (2); 20 Harv. Law Rev. 363, 376, et seq.

* *Atkinson v. Bell*, 8 Barn. & C. 277; *Laird v. Pim*, 7 Mees. & W. 474, 478.

¹⁰ *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Greenleaf v. Gallagher*, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798; *Jones v. Jennings Bros. & Co.*, 168 Pa. 493, 32 Atl. 51; *Puritan Coke Co. v. Clark*, 204 Pa. 556, 54 Atl. 350; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; *Backes v. Black*, 5 Neb. (Unof.) 74, 97 N. W. 321; *McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 371, 81 N. W. 10, 79 Am. St. Rep. 393; *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *John Deere Plow Co. v. Gorman*, 9 Kan. App. 675, 59 Pac. 177; *Star Brewery Co. v. Horst*, 120 Fed. 246, 58 O. C. A. 362.

passed is that the buyer wrongfully refused to accept the goods when tendered, the seller may maintain an action for the price. "The vendor of personal property," said the court in *Dustan v. McAndrew*,¹¹ in a passage already quoted, "in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price."

In other words, the rule is here laid down that the seller may store or retain the goods for the buyer and sue him for the entire price, and, following this statement, the rule has been frequently applied to executory contracts, where the property has not passed because the buyer wrongfully refused to accept the goods.¹² It has been pointed out that "the remedy thus allowed is neither more nor less than specific performance of the contract. In a court of equity a contract for the purchase of land is enforced by a decree ordering the defendant to pay the price upon the transfer of title. In the case of a sale of goods the New York court, and other courts following its rule, allow the seller by force of his own expressed volition to make the buyer

¹¹ 44 N. Y. 73; ante, p. 343.

¹² *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Habeler v. Rogers*, 131 Fed. 43, 45, 65 C. O. A. 281; *Ames v. Molr*, 130 Ill. 582, 591, 22 N. E. 535; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612; *Gaar, Scott & Co. v. Fleshman* (Ind. App.) 77 N. E. 744, 78 N. E. 348; *Darby v. Hall*, 3 Pennewill (Del.) 25, 50 Atl. 64.

As involving the second remedy in the statement in *Dustan v. McAndrew*, supra, see *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Singer Mfg. Co. v. Cheney* (Ky.) 51 S. W. 813; *Magnes v. Seed Co.*, 14 Colo. App. 219, 50 Pac. 879; *Pratt v. Manufacturing Co.*, 115 Wis. 648, 92 N. W. 368; *American Hide & Leather Co. v. Chalkley & Co.*, 101 Va. 458, 44 S. E. 705; *Redhead Bros. v. Investment Co.*, 126 Iowa, 410, 102 N. W. 144.

the owner in spite of the buyer's dissent, and thereupon to recover the price."¹³ In some jurisdictions the application to this rule is confined to cases where the goods are such that they cannot be readily sold for a reasonable price, as where the subject of sale is an article of a special kind to be made to order, which has no general market value.¹⁴ To this extent the rule is adopted by the proposed Sales Act.¹⁵

SAME—ACTION FOR DAMAGES FOR NONACCEPTANCE.¹⁶

113. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

114. MEASURE OF DAMAGES—(1) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(2) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

When the property in the goods has not passed, as where the contract was to sell unascertained goods or goods not in a deliverable state, and the buyer wrongfully neglects or refuses to accept and pay for them, the seller may, of course, maintain an

¹³ "The Right of a Seller of Goods to Recover the Price," 20 Harv. Law Rev. 363, 366. In this article Prof. Williston presents a convincing argument in favor of this rule, at least as restricted in Sales Act, § 63 (3).

¹⁴ *Kinhead v. Lynch* (C. C.) 132 Fed. 692; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Gordon v. Norris*, 49 N. H. 376; *Ballentine v. Robinson*, 46 Pa. 177 (cf. *Puritan Coke Co. v. Clark*, 204 Pa. 556, 54 Atl. 350); *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33.

¹⁵ Section 63 (3).

¹⁶ See Sales Act, § 64.

action against the buyer to recover damages for nonacceptance.¹⁷ In many jurisdictions, indeed, as we have seen, where the neglect or refusal to accept is wrongful, this is his only remedy.¹⁸

Damages for Nonacceptance.

The proper measure of damages for nonacceptance is generally the difference between the contract price and the market price at the place of delivery at the time when the contract is broken, or, as it is usually said, at the time and place of delivery, because the seller may take the goods into the market and obtain the current price for them.¹⁹ If there is no market at that place, the damages must, of course, be otherwise ascertained; for example, upon the basis of the market price at the nearest available market, less the cost of transportation to that market.²⁰ If the goods have no money value, the damages would be equal to the whole contract price;²¹ but, if it is not made to

¹⁷ *Laird v. Pim*, 7 Mees. & W. 474, 478; *Collins v. Delaporte*, 115 Mass. 159, 162; *Gordon v. Norris*, 49 N. H. 376; *Danforth v. Walker*, 37 Vt. 239; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Brand v. Henderson*, 107 Ill. 141; *Ganson v. Madigan*, 13 Wis. 68; *Chapman v. Ingram*, 30 Wis. 290, 294; *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *Benj. Sales*, § 758.

¹⁸ *Ante*, p. 346.

¹⁹ *Barrow v. Arnaud*, 8 Q. B. 595, 608, per Tindal, C. J.; *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Houghton v. Furbush*, 185 Mass. 251, 70 N. E. 49; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Lawrence Canning Co. v. Mercantile Co.*, 5 Kan. App. 77, 48 Pac. 749; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; *Kellogg v. Frohlick*, 139 Mich. 612, 102 N. W. 1057; *Huguenot Mills v. George F. Jempson & Co.*, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; *Hassell Iron Works v. Cohen* (Colo.) 85 Pac. 89.

²⁰ *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769; *McCormick v. Hamilton*, 23 Grat. (Va.) 561; *Barry v. Cavanagh*, 127 Mass. 394; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 444, 20 C. C. A. 503. Where there was no market, the proper measure of damages was the actual loss which the sellers, acting as reasonable men in the ordinary course of business, had sustained. *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20, 25.

²¹ *Allen v. Jarvis*, 20 Conn. 38. Cf. *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769.

appear that the contract price exceeds the market price, only nominal damages may be recovered.²²

Under the rule prevailing in many states, as we have seen, in an executory contract of sale, when the buyer wrongfully refuses to accept the goods, the seller may sell the goods and, after crediting the net amount received, sue for the balance of the purchase price.²³ In making such a sale, the seller must conform to the requirements in respect to diligence, good faith, and notice required of him in a resale where the property has passed.²⁴ It is usually said that such a sale may be resorted to as an alternative means of establishing the market price and thus fixing the measure of damages.

Damages Where Buyer Repudiates.

Where the buyer repudiates the contract before the time fixed for the seller's performance, so that the seller is excused from procuring and tendering the goods, and the seller elects to treat the repudiation as a present breach, and to sue at once, he is entitled to such damages as will put him in the same position as if he had been permitted to complete the contract.²⁵ If the contract is for the sale of goods to be manufactured, the measure of damages in such case is the difference between the cost of manufacturing and delivering the goods and the contract

²² *Foos v. Sabin*, 84 Ill. 564; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172.

²³ *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Singer Mfg. Co. v. Cheney* (Ky.) 51 S. W. 813; *Magnes v. Seed Co.*, 14 Colo. App. 219, 59 Pac. 879; *Pratt v. Manufacturing Co.*, 115 Wis. 648, 92 N. W. 368; *American Hide & Leather Co. v. Chalkley & Co.*, 101 Va. 458, 44 S. E. 705; ante, p. 347.

²⁴ *Alden Speare's Sons Co. v. Hublinger*, 129 Fed. 538, 64 C. C. A. 68; *Nelson v. Rail Co.*, 102 Mo. App. 498, 77 S. W. 590. See cases cited in preceding note; ante, p. 339.

²⁵ *Boorman v. Nash*, 9 Barn. & C. 145; *Phillpotts v. Evans*, 5 Mees. & W. 475; *Thompson v. Alger*, 12 Metc. (Mass.) 428, 443; *Schramm v. Sugar-Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Gordon v. Norris*, 49 N. H. 376; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Camp v. Hamlin*, 55 Ga. 259; *Williams v. Jones*, 1 Bush (Ky.) 621; *Pittsburgh, C. & St. L. Ry. Co. v. Heck*, 50 Ind. 808, 19 Am. Rep. 713; *Sanborn v. Benedict*, 78 Ill. 309; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548. See ante, p. 306.

price.²⁶ And in a recent case, where a contract to sell hops was repudiated by the buyer before the time for delivery had arrived, and the seller sued for the breach, it was held proper to estimate damages on the basis of the difference between the contract price and the price at which it was shown responsible parties would have undertaken to fulfill the contract on the part of the seller.²⁷

If, however, the seller elects not to treat the buyer's repudiation as a present breach, he may not continue the performance and recover damages based on a full performance; that is, he may not increase his damages by a useless performance.²⁸ Thus the proposed Sales Act provides: "If, while labor or expense of material amount are necessary on the part of the sel-

²⁶ *Cort v. Railway Co.*, 17 Q. B. 127, 20 Law J. Q. B. 460; *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Muskegon Curtain-Roll Co. v. Manufacturing Co.*, 135 Pa. 132, 19 Atl. 1008; *Hosmer v. Wilson*, 7 Mich. 295, 74 Am. Dec. 716; *Haskell v. Hunter*, 23 Mich. 305; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 83; *Kingman & Co. v. Wagon Co.*, 176 Ill. 545, 52 N. E. 328; *Chapman v. Railway Co.*, 146 Mo. 481, 48 S. W. 646; *Hadley Dean Plate Glass Co. v. Glass Co.*, 143 Fed. 242, 74 C. C. A. 462.

If materials have been purchased, the difference between their market value and their cost, if the cost is greater, is to be added. If materials have been purchased, and labor has been expended towards their manufacture, the difference between the market value of the partly finished articles and the cost of the materials and the labor expended thereon, if the cost is greater, is to be added. *Kingman & Co. v. Manufacturing Co.*, 92 Fed. 486, 34 C. C. A. 489; ante, p. 306.

²⁷ *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, affirming 91 Fed. 345, 33 C. C. A. 550.

²⁸ *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Lord v. Thomas*, 64 N. Y. 107; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Chicago Bldg. & Mfg. Co. v. Barry* (Tenn. Ch. App.) 52 S. W. 451; *Peck & Co. v. Corrugating Co.*, 96 Mo. App. 212, 70 S. W. 169. Contra: *Roebling Sons Co. v. Fence Co.*, 130 Ill. 660, 22 N. E. 518. Cf. *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 39 L. R. A. 83.

The seller cannot increase his damages by unreasonably lying by and waiting on a rising market. *Roth v. Taysen* (1896) 1 Com. Cas. Q. A. 306.

ler to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand."²⁹ This provision does not require the seller to cease performance in every case, since there may be cases where the damage caused by stopping performance would be greater than that caused by furnishing the necessary work, and in such a case the seller might complete performance and recover damages based on completed performance.³⁰

²⁹ Section 64 (4). The subsection concludes: "The profits the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

³⁰ This is the language of Prof. Williston in his note to this section.

Plaintiff, who was manufacturing out of cotton seed, by the same process, oil, meal, cake, hulls, and lint, all marketable products, sold to defendant, at a fixed price per ton, all the cake and meal to be produced by the mill during the year. After receiving part of it, defendant gave notice that he would not accept any more; but plaintiff continued to manufacture it, and tendered the balance, which defendant refused. Held, that the measure of damages was the difference between the market value and the contract price. *Southern Cotton Oil Co. v. Heflin*, 99 Fed. 339, 39 C. C. A. 546, Selby, J. said:

"In applying rules as to the measure of damages, the courts must have regard to the particular facts of the case in question. * * * The plaintiff was not making one product only. It was making several, obtained from the same perishable raw material. All were made for sale. The meal sold to the defendant was not the chief product. When notified by the defendant that he would not take the meal, the plaintiff could not quit making it, without stopping the mill and abandoning its business of making the other products. To do this the plaintiff would violate its other contracts as to oil, hulls, and lint. The case is not analogous to a contract to make a soda-water apparatus, as in *Tufts v. Lawrence*, 77 Tex. 526, 4 S. W. 165, where only one chattel and two contracting parties are concerned; nor is it strictly analogous to a contract to manufacture cornshellers, as in *Kingman & Co. v. Manufacturing Co.*, 34 C. C. A. 489, 92 Fed. 486, where only one thing is being produced out of the same raw material. Cornshellers, or agricultural implements, cannot be said to have a well-established market value, like cotton, wheat, or cotton seed meal."

Rescission Where Buyer Repudiates.

If, before the time fixed for the seller's performance, the buyer repudiates the contract, the seller may rescind the contract.²¹ And even after partial performance by the seller, if the buyer refuses to accept further performance, the seller may rescind the contract and recover upon a quantum meruit for the goods already delivered.²²

REMEDIES OF THE BUYER—ACTION FOR FAILING TO DELIVER GOODS.

115. (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
- (2) The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.²³

The breach of contract of which the buyer complains may arise from the seller's default in delivering the goods, or from some defect in the goods delivered. There may be a breach of the principal contract for the transfer of the property and the delivery of possession or a breach of warranty. The buyer's remedies for breach of the contract may be treated in the order of time in which they naturally arise—First, his remedies before obtaining possession of the goods, which may be subdi-

²¹ *King v. Falst*, 161 Mass. 449, 37 N. E. 456; *Ballou v. Billings*, 136 Mass. 307. See Sales Act, § 65, providing for rescission, also, where the buyer manifests his inability to perform, or commits a material breach.

²² *Wellston Coal Co. v. Paper Co.*, 57 Ohio St. 182, 48 N. E. 888; *Thompson v. Gaffey*, 52 Neb. 317, 72 N. W. 314. See ante, p. 306.

²³ Sales Act, § 67. See, also, Sale of Goods Act, § 51.

vided into the cases where the contract is executory and the cases where the property has passed; and, second, his remedies after having received possession of the goods.⁸⁴

Damages for Nondelivery.

Before the property has been transferred to the buyer, his only remedy on the contract is ordinarily an action for breach thereof. If he has paid the price, and the goods are not delivered, he may, as will be shown, rescind the contract, and recover what he has paid in an action for money had or received.⁸⁵ If he has not paid the price, his remedy, where the seller fails to deliver, is to sue for damages for breach of the contract. His position is the converse of that of the seller who is suing the buyer for nonacceptance. He has the money in his hands, and may go into the market and buy. The loss which he sustains by the nondelivery of the goods is therefore, under ordinary circumstances, simply the difference between the contract price and the market price of the goods at the time and place of delivery,⁸⁶ or, if no time be fixed, at the time of the refusal to

⁸⁴ Benj. Sales, § 869.

⁸⁵ Post, p. 361.

⁸⁶ Barrow v. Arnaud, 8 Q. B. 604, at page 609; Shaw v. Nudd, 8 Pick. (Mass.) 9; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 208; Fessler v. Love, 48 Pa. 407; Kribs v. Jones, 44 Md. 396; Miles v. Miller, 12 Bush (Ky.) 134; McKercher v. Curtis, 35 Mich. 478; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. 49; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Olson v. Sharpless, 53 Minn. 91, 55 N. W. 125; Hewson-Herzog Supply Co. v. Brick Co., 55 Minn. 530, 57 N. W. 129; Saxe v. Lumber Co., 159 N. Y. 371, 54 N. E. 14; O'Gara v. Ellsworth, 85 App. Div. 216, 83 N. Y. Supp. 120; Smith v. Lime Co., 57 Ohio St. 518, 49 N. E. 695; Potomac Bottling Works v. Barber & Co., 103 Md. 509, 63 Atl. 1068. In case of a total failure to deliver, the buyer may recover the amount with which he could have purchased machines of equal value. If those delivered were defective, the measure of his damages is the cost of supplying the deficiency. Marsh v. McPherson, 105 U. S. 709, 26 L. Ed. 1139. See, also, Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035. When the market value is unnaturally inflated by unlawful means, it is not the true test. Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687. Where goods are purchased to be shipped abroad, and the fact is known to the seller, and it is impossible for the buyer to discover the inferiority of the goods till they reach their ultimate destination, the measure of damages is the difference between the market price of the goods contracted for at the date

deliver;³⁷ and this is the measure of his damages. If he has prepaid the price, he may still sue for nondelivery, and is entitled to recover the market price of the goods without deduction.³⁸ If there is no difference between the contract price and the market price, he is entitled only to nominal damages.³⁹

Even if the seller repudiates the contract before the date of delivery, so that the buyer may sue at once, the damages are to be assessed as of the agreed date of delivery, unless it appears that the buyer could have supplied himself in the market on such terms as to mitigate his loss.⁴⁰ It is always the duty of the buyer to make all reasonable efforts to mitigate his damages.⁴¹

If the time of delivery is extended at the seller's request, damages will be assessed according to the market price at the date to which delivery is postponed.⁴²

of arrival and the price afterwards realized on a sale of the goods, with costs and expenses of sales. *Camden Consol. Oil Co. v. Schlens*, 59 Md. 31, 43 Am. Rep. 537.

³⁷ *Williams v. Ward*, 16 Md. 220; *United Railways & Electric Co. v. H. Wehr & Co.*, 103 Md. 323, 63 Atl. 475. See Sales Act, § 87 (3).

³⁸ *Startup v. Cortazzi*, 2 Cramp. M. & R. 165; *Smethurst v. Woolston*, 5 Watts & S. (Pa.) 106; *Humphreysville Copper Co. v. Mining Co.*, 33 Vt. 92; *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. 486.

³⁹ *Valpy v. Oakeley*, 16 Q. B. 941; *Moses v. Rasin* (C. C.) 14 Fed. 772; *Fessler v. Love*, 48 Pa. 407; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. 174; *Merriman v. Machine Co.*, 96 Wis. 600, 71 N. W. 1050.

⁴⁰ *Roper v. Johnson*, L. R. 8 C. P. 167; *Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. W. 50, 84 Am. St. Rep. 350; *Alger-Fowler Co. v. Tracy*, 98 Minn. 1124, 107 N. W. 1124. Cf. *Frollich v. Glass Co.*, 144 Mich. 278, 107 N. W. 889.

⁴¹ *Nickoll v. Ashton* (1900) 2 Q. B. 298, 305 (1901) 2 K. B. 126; *Watson v. Kirby*, 112 Ala. 436, 20 South. 624; *Kelley, Maus & Co. v. Carriage Co.*, 120 Wis. 84, 97 N. W. 678, 102 Am. St. Rep. 971.

On a contract to sell on credit, where the seller refused to deliver, but offered to deliver at a reduced rate for cash, the fact that the buyer could only buy from the seller did not affect his duty to min-

⁴² *Ogle v. Earl Vane*, L. R. 3 Q. B. 272; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334; *Hill v. Smith*, 84 Vt. 535; *McDermid v. Redpath*, 39 Mich. 372; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364. See, also, *Crescent Hosiery Co. v. Cotton Mills*, 140 N. C. 452, 53 S. E. 140.

Damages Where There is no Market Price.

To the rule of market price there are some exceptions, depending on particular circumstances. The goods may have no market price at the place of delivery for lack of a market, in which case the market value may be determined by ascertaining the market price in the nearest available market, and adding the expense of fetching the goods to the place of delivery.⁴³

If there is no available market, and the goods cannot be obtained with reasonable diligence, the buyer may recover the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.⁴⁴ Thus, if there

imise his loss. *Lawrence v. Porter*, 63 Fed. 62, 11 O. C. A. 27, 26 L. R. A. 167.

If the buyer has supplied himself from another source at less than the market price, he can recover only for the difference between the price paid and the contract price. *Thelss v. Weiss*, 166 Pa. 9, 81 Atl. 63, 45 Am. St. Rep. 638; *Morris v. Supplee*, 208 Pa. 253, 57 Atl. 566.

⁴³ *Grand Tower Co. v. Phillips*, 23 Wall. (U. S.) 471, 23 L. Ed. 71; *Furlong v. Polleys*, 30 Me. 491, 1 Am. Rep. 635; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *Nottingham Coal & Ice Co. v. Preas*, 102 Va. 820, 47 S. E. 823; *Marshall v. Clark*, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84; *National Coal Tar Co. v. Gaslight Co.*, 189 Mass. 234, 76 N. E. 625. *Of. Vogt v. Schlenbeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. R. 756, 106 Am. St. Rep. 989.

⁴⁴ *Parsons v. Sutton*, 66 N. Y. 92; *McHose v. Fulmer*, 73 Pa. 365; *Culin v. Glass Works*, 108 Pa. 220; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Carroll-Porter Boiler & Tank Co. v. Machine Co.*, 5 O. C. A. 190, 55 Fed. 451; *Davis v. Furniture Co.*, 41 W. Va. 717, 24 S. E. 630; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Johnston v. Faxon*, 172 Mass. 466, 52 N. E. 539; *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763; *F. W. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 92 N. W. 788; *Wilmoth v. Hamilton*, 127 Fed. 48, 61 O. C. A. 534; *Ideal Wrench Co. v. Machine Co.*, 92 App. Div. 187, 87 N. Y. Supp. 41, affirmed 181 N. Y. 573, 74 N. E. 1118.

Where lumber dealers purchase and pay for lumber to be delivered at a future time, and then resell it, the measure of damages for breach of the contract and failure to deliver is, in the absence of a market at or near the place of delivery, the amount paid, together with the profits which would have arisen from the resale. *Trigg v. Clay*, 89 Va. 330, 18 S. E. 484, 29 Am. St. Rep. 723.

is no available market, the loss may be determined by ascertaining the cost of manufacturing the goods, if that is the natural and reasonable way to procure them;⁴⁵ or, if the exact description of goods cannot be obtained, by ascertaining the price of the best substitute obtainable, if it is reasonable for the buyer to take that course.⁴⁶

Special Damages.

As in other classes of contracts, the damages may be special as well as general. The measure of general damages is the loss directly and naturally resulting from the breach of the contract, under ordinary circumstances. The rule as to market price flows naturally from this general principle. The measure of special damages is the loss directly and naturally resulting from the breach of contract under the special circumstances of the case as contemplated by the parties. In the leading case of *Hadley v. Baxendale*,⁴⁷ the rule as to the measure of damages in cases of contract was laid down as follows: "Where the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either as arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in

⁴⁵ *Palne v. Sherwood*, 21 Minn. 225; *E. W. Bliss Co. v. Can Co.*, 121 Fed. 51, 65 C. C. A. 289.

⁴⁶ *Hinde v. Liddell*, L. R. 10 Q. B. 265.

⁴⁷ 9 Exch. 341, 354, 23 Law J. Exch. 179.

contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." Substantially the same statement of the rule was made in New York in the leading case of *Griffin v. Colver*,⁴⁸ and these principles have been repeatedly affirmed.

It will be seen that the measure of both general and special damages really depends on the same principle, viz.: That a party is charged with the damages which a reasonable man would contemplate as the probable result of the breach, if he directed his mind to it. It has been objected "that, when parties enter into a contract, they contemplate its performance, and not its breach; but the answer is that the standard of the law is always an objective one. The question is always, not what the particular parties had actually in contemplation, but what a reasonable man with their knowledge would have contemplated as the likely result, if he had directed his attention to it."⁴⁹ Each case involving special damages must be determined by its own merits. Special damages are not recoverable, unless alleged with sufficient particularity to enable the defendant to meet the demand.⁵⁰

Communication of Special Circumstances.

The seller cannot be charged with special damages, unless he had knowledge of the special circumstances from which the special loss would be likely to result;⁵¹ and while, if he had such knowledge, he will generally be charged,⁵² it is important

⁴⁸ 16 N. Y. 489, 69 Am. Dec. 718. See, also, *Cassidy v. Le Fevre*, 45 N. Y. 562.

⁴⁹ Chalm. Sale of Goods Act (6th Ed.) 105. See, also, *Id.* 112.

⁵⁰ *Smith v. Thomas*, 2 Bing. N. C. 372; *Parsons v. Sutton*, 68 N. Y. 92; *Furlong v. Polleys*, 30 Me. 491, 1 Am. Rep. 635.

⁵¹ *Cory v. Bullding Co.*, L. R. 3 Q. B. 181, 37 Law J. Q. B. 68; *British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499, 37 Law J. Q. P. 235; *Bartlett v. Blanchard*, 13 Gray (Mass.) 429; *Fessler v. Love*, 48 Pa. 407; *Billmeyer v. Wagner*, 91 Pa. 92; *Palme v. Sherwood*, 19 Minn. 315 (Gil. 270); *Mihills Mfg. Co. v. Day*, 50 Iowa, 250; *Peace River Phosphate Co. v. Grafflin* (C. C.) 58 Fed. 550; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 185, 53 Atl. 1110.

⁵² *Smeed v. Foord*, 1 El. & El. 602, 28 Law J. Q. B. 178 (loss of crop from delay in furnishing threshing machine). A seller who

to bear in mind that mere communication of the special circumstances is not enough unless it be given under such circumstances as reasonably to imply that it formed the basis of the agreement,—that is, unless the circumstances are such that it must be supposed that a reasonable man would have had them in contemplation as a probable result of the breach of the contract.⁵³

A seller is usually bound for such damages as result to the buyer from being deprived of the ordinary use of a chattel, but not for such damages as result to him from being deprived of its use for a special or extraordinary purpose, which was not communicated.⁵⁴ So the buyer is not usually entitled to damages arising from loss of profits on a subsale, or from penalties or expenses incurred by him from inability to execute such subsale;⁵⁵ but he may recover such damages if the subsale and the other special circumstances necessary to advise him of the probable consequences of a breach were communi-

contracts to supply a butcher with ice, knowing it is required to preserve meat, is liable if the meat spoils in consequence of his failure to supply, and the buyer is unable to supply himself elsewhere. *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129. The full amount of damage to lettuce growing in a greenhouse, and frozen by reason of failure to supply water for steam heating, is the measure of damages for such failure. *Watson v. Inhabitants of Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287. See, also, *Hockersmith v. Hanley*, 29 Or. 27, 44 Pac. 497; *Neal v. Hardware Co.*, 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697; *Blumenthal v. Stahle*, 98 Iowa, 722, 68 N. W. 447; *Kelley, Maus & Co. v. Carriage Co.*, 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

⁵³ *British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship*, cited in note 51; *Horne v. Railway Co.*, L. R. 7 C. P. 583, 591, L. R. 8 Q. P. 131, per Willes, J.; *Booth v. Mill Co.*, 60 N. Y. 487, 496; *Globe Refining Co. v. Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; *E. W. Bliss Co. v. Can Co.*, 131 Fed. 52, 65 C. C. A. 289; *Marshall v. Clark*, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84.

⁵⁴ *Cory v. Building Co.*, L. R. 3 Q. B. 181, 37 Law J. Q. B. 68.

⁵⁵ *Williams v. Reynolds*, 6 Best & S. 495, 34 Law J. Q. B. 221; *Devlin v. City of New York*, 63 N. Y. 8; *Cockburn v. Lumber Co.*, 54 Wis. 619, 627, 12 N. W. 49. See, also, *Fox v. Harding*, 7 Cush. (Mass.) 516; *Coffin v. State*, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188; *Moffit-West Drug Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351; *Huggins v. Cement Co.*, 121 Ga. 311, 48 S. E. 933.

cated to the seller.⁵⁶ For a full discussion of the rules of damages common to sales and other classes of contracts, the reader is referred to works upon damages.

SAME—SPECIFIC PERFORMANCE.

- 116. Where an action for damages will not afford an adequate compensation for breach of the seller's contract to deliver the goods, a court of equity may enforce the specific performance of the contract.**

As a general rule, where a party has a plain, adequate, and complete remedy at law, equity will not assume jurisdiction. Under ordinary circumstances, the buyer can go into the market and buy other goods in place of those which the seller fails to deliver, and therefore an action for damages affords the buyer an adequate remedy. In exceptional cases, however, where the contract is to sell a specific chattel, where a similar article cannot be obtained, equity will interfere.⁵⁷ For example, specific performance has been granted where the articles purchased were of unusual beauty, rarity, and distinction, such as objects of virtu;⁵⁸ where the subject of sale was a patent right,⁵⁹ or a slave;⁶⁰ and in a recent case even where the goods were indispensable to the buyer's business, and could not otherwise be obtained in the city where he was engaged in business.⁶¹

⁵⁶ *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Material v. Armstrong*, L. R. 9 Q. B. 473; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *Grebert-Borgnuls v. Nugent*, 15 Q. B. Div. 85; *Messmore v. Lead Co.*, 40 N. Y. 422; *Booth v. Mill Co.*, 60 N. Y. 487; *Robinson v. Hyer*, 35 Fla. 544, 17 South. 745; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Lilly v. Lilly, Bogardus & Co.*, 39 Wash. 337, 81 Pac. 852.

⁵⁷ *Cuddee v. Rutter*, 1 White & T. Lead. Cas. Eq. (Am. Ed. 1876) p. 1063, and notes. See Sales Act, § 68.

⁵⁸ *Falcke v. Gray*, 4 Drew. 658, 29 Law J. Ch. 28.

⁵⁹ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Hapgood v. Rosenstock* (C. C.) 23 Fed. 86. So of a patented article. *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Hull v. Pitrat* (C. C.) 45 Fed. 94.

⁶⁰ *Young v. Burton*, 1 McMul. Eq. (S. C.) 255.

⁶¹ *Equitable Gaslight Co. v. Manufacturing Co.*, 68 Md. 235. A

A contract to sell shares of stock will not be specifically enforced, if such shares can be bought in the market,⁵² or if the award of damages would be an adequate remedy;⁵³ but if the shares are not obtainable, and the remedy of damages would be inadequate, equity will grant relief.⁵⁴

SAME-RECOVERY UPON FAILURE OF CONSIDERATION.

117. Where the buyer has paid the price and the seller fails entirely to perform his contract, the buyer may rescind the contract and recover the money so paid.

When the seller fails entirely to perform his part of the contract, the buyer may put an end to it, and recover in an action for money had and received any part of the price which he has advanced.⁵⁵ This is in accordance with the general rule that when a party to a contract has paid money, and the other has wholly failed to perform on his part, or, as it is ordinarily put, the consideration has failed, the former is entitled to restitution.⁵⁶

The rule applies in favor of the buyer where there is a warranty of the title, and it turns out that the seller was without

contract to sell a newspaper business, printing plant, and material used in the business will be specifically enforced. *Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

⁵² *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735.

⁵³ *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; *Moulton v. Manufacturing Co.*, 81 Minn. 259, 83 N. W. 1082.

⁵⁴ *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Northern Cent. R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

⁵⁵ *Giles v. Edwards*, 7 Term R. 181; *Hill v. Rewee*, 11 Metc. (Mass.) 268, 271; *Miner v. Bradley*, 22 Pick. (Mass.) 457, 458; *Howe Mach. Co. v. Willie*, 85 Ill. 333; *Barr v. Logan*, 5 Har. (Del.) 62; *Cleveland v. Sterrett*, 70 Pa. 204; *Nash v. Towne*, 5 Wall. (U. S.) 699, 18 L. Ed. 527; *Petersen v. Lumber Co.*, 51 Mich. 86, 16 N. W. 243; *Winn v. Morris*, 94 Ga. 452, 20 S. E. 339; *Richter v. Stock Co.*, 129 Cal. 367, 62 Pac. 39. *Benj. Sales*, § 423. Money paid for shares in a projected company, which is not formed, may be recovered back. *Kempson v. Saunders*, 4 Bing. 6. See *Sales Act*, § 70.

⁵⁶ *Clark*, Cont. (2d Ed.) 468.

title.⁶⁷ So, if the subject of sale be a bill or note or other security, and it turns out to be invalid because of forgery⁶⁸ or for other causes,⁶⁹ the instrument thus not being what it purports, or is described,⁷⁰ to be, but a mere worthless piece of paper, the buyer may rescind the sale, and may defend an action for the price, or may recover the price if he has paid it. So, in the sale of a patent, if the patent is void.⁷¹ But, though the thing sold proves to be worthless, if the buyer assumed the risk of its validity, and consequently obtained the identical thing which he intended to buy, there is no failure of consideration.⁷²

⁶⁷ Ante, p. 245.

⁶⁸ Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 El. & Bl. 133, 24 Law J. Q. B. 46; Terry v. Bissell, 28 Conn. 23; Aldrich v. Jackson, 5 R. I. 218; Merriam v. Wolcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69. See, also, Whitney v. Bank, 45 N. Y. 303; Bell v. Dagg, 60 N. Y. 523.

⁶⁹ Burchfield v. Moore, 2 El. & Bl. 683 (material alteration); Gomperz v. Bartlett, 2 El. & Bl. 849, 23 Law J. Q. B. 65 (a bill of exchange purporting to be a foreign bill, which turned out to be a domestic bill, and invalid because unstamped); Wood v. Sheldon, 42 N. J. Law, 421, 36 Am. Rep. 523 (scrip illegally and fraudulently issued); Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Dec. 598; Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199 (bond stricken with nullity by constitutional provision adopted after act authorizing issue). Cf. Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171.

⁷⁰ See Meyer v. Richards, *supra*, resting the doctrine of warranty or condition of identity in a sale by description.

⁷¹ Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Harlow v. Putnam, 124 Mass. 553; Shepherd v. Jenkins, 73 Mo. 510; Green v. Stuart, 7 Baxt. (Tenn.) 418; Herzog v. Heyman, 151 N. Y. 537, 45 N. E. 1127, 56 Am. St. Rep. 646. Cf. Chemical Electric Light & Power Co. v. Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168;

⁷² Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Blattenberger v. Holman, 103 Pa. 555; Neldefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832.

On this principle it has been held that, where bonds are sold which are invalid because the corporation has not power to issue them or failed to comply with the law in their issuance, the purchaser is liable on his promise to pay. Otis v. Cullum, 92 U. S. 447, 23 L. Ed. 496; Harvey v. Dale, 96 Cal. 160, 31 Pac. 14; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98. But see Hurd v. Hall, 12 Wis. 136.

The Failure must be Total.

To authorize rescission, if the contract be entire, the failure of consideration must be total. The buyer is not obliged, indeed, to accept a partial performance, and, if such performance only is tendered, he may rescind the contract, and recover back the price.⁷³ But, if he has accepted a partial performance, he cannot, at least without returning what he has received, afterwards rescind, but must sue for breach of the contract.⁷⁴ If he has enjoyed part of the consideration, there can be no rescission.⁷⁵ Nevertheless, although the contract be entire, if it is for a definite quantity of goods all of one quality at a fixed price per ton or pound, and the seller delivers only a part and makes default in delivering the remainder, it is held that the buyer who has advanced the price of the whole may recover back the price of the part which is deficient.⁷⁶ In this case the entirety of the contract is broken by the concurrent act of the parties.⁷⁷ But, if the failure is merely as to the quality

Gloucester Isinglass & Glue Co. v. Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214. But where the plaintiff bought the exclusive right to use a patent in a foreign country, being aware that no such right could legally be obtained, but desiring an ostensible grant of the right, with the object of floating a company, it was held that, having obtained what he intended to buy, he could not recover the purchase money on the ground that the consideration had failed. *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, affirmed in 1 Q. B. Div. 679. And see, also, *Taylor v. Hare*, 1 Bos. & P. N. R. 260; *Lawes v. Purser*, 6 El. & Bl. 930, 26 Law J. Q. B. 25.

⁷³ *Giles v. Edwards*, 7 Term R. 181. See *Smith v. Lewis*, 40 Ind. 98; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *ante*, p. 283.

⁷⁴ *Harnor v. Groves*, 15 C. B. 669, 24 Law J. C. P. 53; *Miner v. Bradley*, 22 Pick. (Mass.) 457; *Clark v. Baker*, 5 Metc. (Mass.) 452; *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100.

⁷⁵ *Taylor v. Hare*, 1 Bos. & P. N. R. 260; *Lawes v. Purser*, 6 El. & Bl. 930, 26 Law J. Q. B. 25; *Benj. Sales*, § 427.

⁷⁶ *Devaux v. Conolly*, 8 C. B. 640; *Hill v. Rewee*, 11 Metc. (Mass.) 268, 272. This is in the nature of a total failure of consideration for part of the price paid, not a partial failure for the whole. *Benj. Sales*, § 426. As to what constitutes a severable contract, see *Norris v. Harris*, 15 Cal. 226; *McGrath v. Cannon*, 55 Minn. 457, 57 N. W. 150; *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983; *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259.

⁷⁷ *Mansfield v. Trigg*, 118 Mass. 350, 352, *per Wells, J.*

of a part of the goods, the buyer cannot rescind unless he rescinds as to the whole.⁷⁸

**SAME—ACTION FOR CONVERTING OR DETAINING
GOODS.**

- 118. Where the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.⁷⁹**

When the property has passed, if the seller refuses to deliver, the buyer has the same right of action for nondelivery as if the property had not passed; but he has, in addition to his right of action on the contract, the rights of an owner. He has not only the property in the goods, but the right of possession, defeasible in the case of his failure to pay for the goods.⁸⁰ If he is not in default, therefore, he may, on the refusal of the seller to deliver, maintain an action for conversion. As a rule, the measure of the buyer's damages in such an action, either against the seller⁸¹ or a third person, who has dealt with the goods under such circumstances as to amount to a conversion,⁸² is the value of the goods at the time of the conversion. But he cannot recover greater damages against the seller by suing in tort than by suing on the contract; and, if he has not paid for the goods, the measure of his damages will be the difference between the contract price and the market value.⁸³

⁷⁸ *Harnor v. Groves*, 15 C. B. 669, 24 Law J. C. P. 53; *Clark v. Baker*, 5 Metc. (Mass.) 452; *Morse v. Brackett*, 98 Mass. 205; *Id.*, 104 Mass. 494; *Mansfield v. Trigg*, 113 Mass. 350.

⁷⁹ Sales Act, § 66.

⁸⁰ *Benj. Sales*, §§ 883, 886.

⁸¹ *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Philbrook v. Eaton*, 134 Mass. 398. As to the measure of value where property converted is of fluctuating value, see *Hale, Damages*, 186.

⁸² *Chinery v. Viall*, cited in following note; *France v. Gaudet*, L. R. 6 Q. B. 199; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854.

⁸³ *Chinery v. Viall*, 5 Hurl. & N. 288, 29 Law J. Exch. 180.

In virtue of his ownership, the buyer may also maintain an action of replevin for the recovery of possession of the goods, but actions for the recovery of possession are generally regulated by statute.⁸⁴

BREACH OF WARRANTY—RIGHTS BEFORE ACCEPTANCE.

- 119.** Where, under a contract to sell, the seller tenders goods which are not such goods as are described and as warranted, expressly or by implication, the buyer, if he has not accepted the goods, may reject the goods and maintain an action against the seller for breach of the contract or warranty, or the buyer may rescind the contract and recover the price or any part which he has paid.

Where there is a contract to sell goods by description, as we have seen, there is an implied warranty that the goods shall correspond with the description, and if they do not the buyer may reject them.⁸⁵ And the rule is the same where there is a breach of the warranty which is implied in a contract to sell by sample that the goods shall correspond with the sample in quality.⁸⁶ For the same reason, in a contract to sell, the buyer may reject the goods if they fail to conform to the quality which the seller warranted they should possess.⁸⁷ "When the subject-matter of a sale is not in existence or is not

⁸⁴ See *Esson v. Tarbell*, 9 Cush. (Mass.) 407; *Freelove v. Freelove*, 128 Mass. 190; *Glass v. Blazer*, 91 Mo. App. 564; *Barber v. Harper* (N. M.) 86 Pac. 546.

⁸⁵ Ante, p. 247 et seq. The buyer is not deemed to have accepted until he has had a reasonable opportunity of examining the goods to ascertain whether they conform to the contract. Ante, p. 204.

⁸⁶ Ante, p. 292 et seq.

⁸⁷ *Street v. Blay*, 2 Barn. & Adol. 456; *Byers v. Jonas*, 2 Exch. 111, 117; *Hellbutt v. Hickson*, L. R. 7 C. P. 438, 451; *Azemater v. Casella*, 2 L. R. C. P. 431; *Dalley v. Green*, 15 Pa. 126; *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131; *Cox v. Long*, 69 N. C. 7, 9; *Lewis v. Rountree*, 78 N. C. 323; *Byers v. Chapin*, 28 Ohio St. 300; *Bigger v. Bovard*, 20 Kan. 204; *Polhemus v. Helman*, 45 Cal. 573; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Rubin v. Sturtevant*, 80 Fed. 980, 26 C. C. A. 259; *Cincinnati Punch & S. Co. v. Thompson*, 72 Kan. 432, 83 Pac. 938.

ascertained at the time of the contract, an understanding that it shall, when existing or ascertained, possess certain qualities is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities, being part of the description of the thing sold, became essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."⁸⁸ In this passage the seller's engagement is called a condition, and not a warranty, but the essential matter is the nature of the engagement.⁸⁹ The right to reject is not confined to cases where the warranty of quality is implied. "When there is an express warranty of quality upon an executory contract of sale, and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty, * * * he may return the articles and rescind the contract."⁹⁰ It seems that the rule is the same in the case of a contract to sell specific goods, accompanied by a warranty of quality, where the property has not passed.⁹¹

The right to reject arises whenever there is a breach of a warranty or promise with reference to the goods which is an essential term of the contract. "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which the term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate

⁸⁸ *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, per Woods, J. See 2 Smith, Lead. Cas. (8th Am. Ed.) *31; Benj. Sales, § 805.

⁸⁹ Ante, p. 282.

⁹⁰ *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259, per Wallace, J.

⁹¹ Benjamin, Sales, §§ 889-892, commenting on *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, which was a case where specific goods to arrive by ship were guaranteed "about similar to samples," and there are dicta to the effect that where the contract is for specific goods, the buyer has no right to reject for breach of warranty. See *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; ante, p. 264. Cf. *Varley v. Whipp* (1900) 1 Q. B. 513. See Sales Act, §§ 11 (2), 69 (1) (c).

the whole contract."⁸² Where there is a warranty of title, if the seller tenders goods to which he has not title, the buyer may reject them.⁸³

Where the buyer rejects the goods for breach of warranty, two courses are open to him: (1) He may affirm the contract, and maintain an action against the seller for damages for the breach of the contract.⁸⁴ Here the position of the buyer is substantially the same as in an action against the seller for failing to deliver the goods.⁸⁵ (2) The buyer may rescind the contract and sue to recover the price, or any part of it, which he has paid.⁸⁶ Here the seller is in substantially the same position as when he rescinds the contract for so-called failure of consideration.⁸⁷

⁸² *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, per Gray, J. See, also, *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372.

⁸³ *Ante*, p. 245.

⁸⁴ *Hamilton v. Ganyard*, 2 Abb. Dec. (N. Y.) 314; *Taylor v. Saxe*, 184 N. Y. 67, 31 N. E. 258. See Sales Act, § 69 (1) (c).

⁸⁵ *Ante*, p. 353.

⁸⁶ *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259; *Meador v. Cornell*, 58 N. J. Law, 375, 33 Atl. 960. See, also, *Barr v. Logan*, 5 Har. (Del.) 52.

When there is an express warranty upon an executory contract of sale, and the articles which are the subject thereof do not correspond to the warranty, the vendee may return them, as not being what he has agreed to buy, and rescind the contract; and if several distinct articles at different prices are embraced in the contract, though covered by the same warranty, a right of rescission exists as to each. When the vendee in an executory contract of sale rescinds the contract, and returns the goods, because they do not correspond to a warranty, but the vendor refuses to receive them, it is proper, if not obligatory, for the vendee to take such measures as are expedient to save unnecessary loss to the vendor, and if he sells them, exercising reasonable diligence he is responsible only for the proceeds. *Rubin v. Sturtevant*, *supra*. See Sales Act, § 69 (1) (d).

⁸⁷ *Ante*, p. 361.

SAME—RIGHTS AFTER ACCEPTANCE.

120. Where there is a breach of warranty, if the buyer has accepted the goods, he may, at his election—

- (a) In many (but not in most) jurisdictions rescind the sale, and return or offer to return the goods to the seller, and recover the price, or any part thereof, which has been paid.
- (b) Maintain an action against the seller for damages for breach of the warranty.
- (c) Set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price.

121. **MEASURE OF DAMAGES FOR BREACH OF WARRANTY.** The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the case of breach of warranty of quality or condition, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Rescission.

If the buyer accepts the goods, it is held in England, and in many jurisdictions in this country, that he cannot afterwards rescind the sale and return the goods on account of a mere breach of warranty.* By accepting, he waives his right to re-

* *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Denton*, 1 Crompt. & M. 207; *Payne v. Whale*, 7 East, 274; *Dawson v. Collis*, 10 C. B. 523, 533; *Thornton v. Wynn*, 12 Wheat. (U. S.) 183, 6 L. Ed. 595; *Matteson v. Holt*, 45 Vt. 336; *Freyman v. Knecht*, 78 Pa. 141; *Muller v. Eno*, 14 N. Y. 597; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753; *Hoover v. Sldener*, 98 Ind. 290; *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Wright v. Davenport*, 44 Tex. 164; *Owens v. Sturges*, 67 Ill. 366; *Kemp v. Freeman*, 42 Ill. App. 500 (but see *Sparling v. Marks*, 86 Ill. 125); *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *H. W. Williams Transp. Line v. Transportation Co.*, 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939; *Worcester Mfg. Co. v. Brass Co.*, 73 Conn. 554, 48 Atl. 422; *Thomas China Co. v. C. W. Raymond Co.*, 135 Fed. 25, 67 C. C. A. 629; *Sale of Goods Act*, § 53. The cases pro and con are collected 16 Harv. Law Rev. 465. The

ject them, and, in the absence of fraud⁹⁹ or special agreement,¹⁰⁰ must seek his remedy either by action on the warranty or by setting up the breach in diminution of the price. And this applies equally, whether the sale is of a specific chattel unconditionally, in which case an acceptance takes place when the contract is entered into, or where there is a contract to sell unascertained goods, which are subsequently accepted.

In many states, however, a different rule prevails, and it is held that the buyer may rescind the contract for breach of warranty, notwithstanding acceptance, and recover what he has paid, provided he seasonably returns or offers to return the goods to the seller.¹⁰¹ In favor of this rule it is to be said

buyer cannot rescind after using part of the goods. *Lyon v. Bertram*, 20 How. (U. S.) 149, 15 L. Ed. 847.

⁹⁹ Ante, p. 174.

¹⁰⁰ *Eyers v. Haddem* (C. C.) 70 Fed. 648; *McCormick Harvesting Mach. Co. v. Knoll*, 57 Neb. 790, 78 N. W. 394.

¹⁰¹ *Bryant v. Isburgh*, 13 Gray (Mass.) 607, 74 Am. Dec. 655; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *Branson v. Turner*, 77 Mo. 489; *Johnson v. Agricultural Co.*, 20 Mo. App. 101; *Rogers v. Hanson*, 35 Iowa, 283; *Upton Mfg. Co. v. Hulske*, 69 Iowa, 557, 29 N. W. 621 (cf. *Eagle Iron Works v. Railway Co.*, 101 Iowa, 289, 70 N. W. 193); *Tyler v. City of Augusta*, 88 Me. 504, 34 Atl. 406; *Milliken v. Randall*, 89 Me. 200, 36 Atl. 75; *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004; *Boothby v. Scales*, 27 Wis. 626; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154; *Gale Sulky-Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 739; *Thompson v. Harvey*, 86 Ala. 519, 5 South. 825; *Hodge v. Tufts*, 115 Ala. 306, 22 South. 422.

"He to whom property is sold with an express warranty, as well as he to whom it is sold with an implied warranty, may rescind for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it have been paid to him. * * * In 1816, when the case of *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122, was before this court, and afterwards, until 1831, the law of England on the point raised in the present case was supposed to be as we now hold it to be here. Lord Eldon had said in *Curtis v. Hannay*, 3 Esp. 82, that he took it to be 'clear law,' and so it was laid down in 2 Selw. N. P. (1st Ed.) 586, in 1807, and in *Long, Sales*, 125, 126, in 1821, and in 2 Starkie, Ev. (1st Ed.) 645, in 1825. In 1831, in *Street v. Blay*, 2 Barn. & Adol. 461, Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of king's bench. Yet our court subsequently (in 1839) decided the case of

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that, although the warranty be collateral in form, it is an inducement to the sale and a material element of the consideration, and that what the buyer has in mind is the performance of the warranty, and not damages for its breach.¹⁰² This rule is adopted by the proposed Sale of Goods Act,¹⁰³ which provides that, where there is a breach of warranty by the seller, the buyer may, at his election, as one of his alternative remedies, "rescind the contract to sell, or the sale, and refuse to receive the goods, or, if the goods have already been received, return them, or offer to return them, to the seller, and recover the price, or any part thereof, which has been paid."

Action for Damages.

That the buyer, after receiving or accepting the goods, may still bring an action for damages in case the goods are inferior in quality to that warranted, follows, as Benjamin says,¹⁰⁴ from the general rule that an action for damages lies in every case of a breach of contract.

Where the warranty is express, the courts are substantially unanimous in holding that the warranty survives acceptance

Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56. The doctrine of that decision prevents circuity of action and multiplicity of suits, and at the same time accomplishes all the ends of justice." *Bryant v. Isburgh*, supra, per Metcalf, J.

¹⁰² "It is obvious that when a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it, which is in his mind. He does not want an unsound horse, worth half the money, and the difference in damages. He wants to be perfectly sure that he is getting a sound horse, and, if the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make as is any defendant, if compelled to perform his part of a contract when the plaintiff is materially in default." 16 Harv. Law Rev. 472.

¹⁰³ Section 69 (1) (d). See, also, section 69 (3), (4) and (5). Cf. section 49.

The remedy by rescission is defended by Prof. Williston against the theoretical objections that rescission is not allowable in the case of an executed contract in any event, and that a warranty is a collateral obligation, and on account of the practical advantages of allowing the remedy. 16 Harv. Law Rev. 485. This led to a discussion with Prof. Burdick, who supported the English doctrine. See 4 Columbia Law Rev. 1, 195, 265; 17 Harv. Law Rev. 500

¹⁰⁴ Benj. Sales, § 897.

of the goods notwithstanding that the buyer has notice of defects which constitute a breach of the warranty.¹⁰⁶ An action for breach of warranty may be maintained by the buyer without giving notice to the seller of the defects, and without offer to return,¹⁰⁶ though failure to give notice or to return raises a strong presumption or inference that the goods were not actually defective.¹⁰⁷ Some courts, however, hold that a different rule applies in the case of an implied warranty.

¹⁰⁶ *Poulton v. Lattimore*, 9 Barn. & C. 259; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Scott v. Raymond*, 81 Minn. 437, 18 N. W. 274; *Cox v. Long*, 69 N. C. 7; *Polhemus v. Helman*, 45 Cal. 573; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 280, 23 N. E. 372, 16 Am. St. Rep. 753; *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. D. 81, 54 N. W. 311; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Iroquois Furnace Co. v. Manufacturing Co.*, 181 Ill. 582, 54 N. E. 987; *Crook v. Railroad Co.*, 80 Md. 338, 30 Atl. 701; *Laporte Improvement Co. v. Brock*, 99 Iowa, 435, 68 N. W. 810, 61 Am. St. Rep. 245; *Miamisburg Twine & C. Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175; *Stillwell, etc., Co. v. Canning Co.*, 78 Miss. 779, 29 South. 513.

¹⁰⁶ *Poulton v. Lattimore*, 9 Barn. & C. 259; *Fielder v. Starkin*, 1 H. Bl. 17; *Pateshall v. Tranter*, 3 Adol. & E. 103; *Douglass Axe Manuf'g Co. v. Gardner*, 10 Cush. (Mass.) 88; *Vincent v. Leland*, 100 Mass. 432; *Richardson v. Grandy*, 49 Vt. 22; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 58 Am. Rep. 570; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Ferguson v. Hosler*, 58 Ind. 438; *English v. Commission Co. (C. C.)* 48 Fed. 196; *Id.*, 6 C. C. A. 416, 57 Fed. 451; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783.

¹⁰⁷ *Poulton v. Lattimore*, 9 Barn. & C. 259, 265; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 28 Am. St. Rep. 800; *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563; *Hodge v. Tufts*, 115 Ala. 866, 22 South. 422; *Benj. Sales*, § 900. Cf. *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93. Some courts, however, draw a distinction between patent and latent defects, and hold that, if the defects are so visible that it is apparent the buyer knew of them when he received the goods, the buyer, by accepting the goods in fulfillment of the contract, waives his right to avail himself of the warranty. See *Buffalo Barb-Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295; *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *Nye v. Alcohol Works*, 51 Iowa, 120, 50 N. W. 988, 33 Am. Rep. 121. Cf. *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893. See *Sales Act*, § 49; ante, p. 301.

Same—Breach of Implied Warranty.

The distinction between a "warranty" in the narrower sense—that is, a promise with reference to the goods when it is collateral to the main purpose of the contract—and a promise the performance of which by the seller is a condition precedent to the obligation of the buyer to accept the goods, and which is often itself termed a "condition," has been pointed out.¹⁰⁸

In England, where the seller's implied promises of quality, as well as the implied promises in sales by description and by sample are termed "conditions," the rule nevertheless prevails that the buyer may waive performance of the condition and may elect to treat the breach of the condition as a breach of warranty, and he may, therefore, if the goods do not fulfill the condition, accept them and set up the breach of warranty in diminution or extinction of the price, or maintain an action for damages for the breach.¹⁰⁹

In the United States, although these implied promises of the seller are usually termed "warranties," by weight of authority the rule is substantially the same; that is, the warranty survives acceptance of the goods, notwithstanding that the buyer has notice of defects which constitute a breach of the warranty, unless it appears that he accepted the goods in full satisfaction of the contract, and he may seek redress in an action or counterclaim for damages, or in recoupment when sued for the price.¹¹⁰ Thus, in a leading case,¹¹¹ where there

¹⁰⁸ Ante, p. 226.

¹⁰⁹ Sales of Goods Act, §§ 11 (1) (a), 53 (1). See *Benj. Sales*, § 564, citing *Ellen v. Topp*, 6 Exch. 424; *Behn v. Burners*, 3 Best & S. 751, 32 Law J. Q. B. 204.

¹¹⁰ *Bagley v. Mill Co.* (C. C.) 21 Fed. 159; *English v. Commission Co.* (C. C.) 48 Fed. 197; *Id.*, 6 C. C. A. 416, 57 Fed. 451; *Reynolds v. Palmer* (C. C.) 21 Fed. 433; *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 120 Fed. 906, 57 C. C. A. 498; *Wolcott v. Mount*, 38 N. J. Law, 262, 13 Am. Rep. 438; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; *Lewis v. Rountree*, 78 N. C. 323; *Eagan Co. v. Johnson*, 82 Ala. 233, 2 South. 302; *Dayton v. Hooglund*, 39 Ohio St. 671; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Tacoma Coal Co. v. Bradley*, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. Rep. 890; *Morse v. Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Northwestern*

¹¹¹ *English v. Commission Co.*, 57 Fed. 451, 6 C. C. A. 416.

was an implied warranty that the goods should be of merchantable quality, it was said: "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty; some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." This rule, which is supported by the weight of authority, is adopted by the proposed American Sales Act.¹¹²

In some states, however, a distinction is drawn between "conditions" and warranties; and it is held that while a collateral promise survives acceptance, even as to known defects, a promise that the goods shall be of a certain kind or quality, forming part of the description, does not survive acceptance, so far as concerns visible defects, when the buyer has had an opportunity to inspect, but that if, after opportunity for inspection, the buyer accepts the goods, he is precluded from recovering damages for any variation between the goods delivered and the goods described in the contract.¹¹³

Cordage Co. v. Rice, 5 N. D. 432, 87 N. W. 298, 57 Am. St. Rep. 568; *Graff v. D. M. Osborne & Co.*, 56 Kan. 162, 42 Pac. 704; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Alabama Steel & Wire Co. v. Symons*, 110 Mo. App. 41, 83 S. W. 78. See, also, *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139.

¹¹² See sections 49, 69 (1) (a), (b). Cf. section 15 (3).

¹¹³ *Haase v. Nonnemacher*, 21 Minn. 486; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150 (implied condition of merchantableness does not survive ac-

Diminution of damages—Recoupment.

Instead of bringing an action for damages, the buyer may wait till he is sued for the price, and then set up the breach

ceptance in respect to visible defects); *Lee v. Bangs*, 43 Minn. 23, 44 N. W. 871 (sale by sample); *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718 (cf. *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755, holding that an implied warranty of fitness for purpose survives); *Comstock v. Sanger*, 51 Mich. 497, 16 N. W. 872; *Williams v. Robb*, 104 Mich. 242, 62 N. W. 352; *W. K. Henderson Lumber Co. v. Stilwell & Co.*, 130 Mich. 124, 89 N. W. 718; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96; *Jones v. McEwan*, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399 (cf. *Munford v. Kevill*, 109 Ky. 246, 58 S. W. 703); *Hazen v. Wilhelmie*, 68 Neb. 79, 93 N. W. 920; *Neff v. McNeeley*, 1 Neb. (Unof.) 416, 96 N. W. 150. And see *Day v. Const. Co.*, 174 Mass. 412, 54 N. E. 873. It is difficult to reconcile all the New York cases on this point, but the result of the later decisions may be gathered from the following extracts and citations: "An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Gurney v. Railroad Co.*, 58 N. Y. 358; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608." *Studer v. Bleistein*, 115 N. Y. 316, 325, 22 N. E. 243, 5 L. R. A. 702, per Ruler, C. J. "Upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection. *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. 905; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Gurney v. Railroad Co.*, 58 N. Y. 358. * * * The cases of *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, and other cases of like character—are clearly distinguishable, inasmuch as one is a contract concerning a sale by sample, and the others were executory contracts for the manufacture and sale or delivery of goods of a particular description. In cases of the latter character, where the quality of the goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted, and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the

of warranty in diminution pro tanto of the damages.¹¹⁴ And at common law this was his only way of availing himself of a breach of warranty as a defense. The rule was stated by Parke, B., in the leading case of *Mondel v. Steel*,¹¹⁵ as follows: "Formerly it was the practice, when an action was brought for an agreed price of a specific chattel sold with a warranty, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty; in which action as well the difference between the price contracted for and the real value of the articles as any consequential damage might have been recovered. * * * The performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the

contract." *Zabriskie v. Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006, per Ruger, C. J. See, also, *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. Tool Co.*, 54 N. Y. 586; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Bierman v. Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635; *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 72; *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. Supp. 34; *Lifshitz v. McConnell*, 80 App. Div. 289, 80 N. Y. Supp. 253; *Lichtenstein v. Rabolinsky*, 98 App. Div. 516, 90 N. Y. Supp. 247, affirmed 184 N. Y. 520, 76 N. E. 1099. "Where the purchaser of goods delivered on an executory contract, with full knowledge, or with full opportunity for examination and knowledge, of their defects, which are open and apparent upon mere inspection, takes them into his possession, and appropriates them to his own use, without notifying the vendor at the time of receiving them, or within a reasonable time thereafter, that they are not accepted as fulfilling the contract, he cannot recoup damages for such defects or failures in an action for the contract price." *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777, per Cassidy, J. Cf. *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963.

¹¹⁴ *Mondel v. Steel*, 8 Mees. & W. 858; *Withers v. Greene*, 9 How. (U. S.) 213, 13 L. Ed. 109; *Lyon v. Bertram*, 20 How. (U. S.) 149, 154, 15 L. Ed. 847; *Bradley v. Rea*, 14 Allen (Mass.) 20; *Dalley v. Green*, 15 Pa. 118, 126; *Dayton v. Hooglund*, 39 Ohio St. 671; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Morehouse v. Comstock*, 42 Wis. 626; *Polhemus v. Helman*, 45 Cal. 573; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *Central Trust Co. v. Manufacturing Co.*, 77 Md. 202, 26 Atl. 493; *Avery v. Burrall*, 118 Mich. 672, 77 N. W. 272; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154.

¹¹⁵ 8 Mees. & W. 858.

chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back. He has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. * * * But, after the case of *Basten v. Butter* (7 East, 479), a different practice began to prevail, and, being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattels, by reason of the noncompliance with the warranty, were diminished in value. * * * The rule is that it is competent for the defendant, not to set off by a procedure in the nature of a cross action the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more."

This case also determined that the buyer must bring a cross action if he desired to claim consequential or special damages; but, under the changed procedure now generally prevailing, the buyer may recover such damages by way of counterclaim.¹¹⁶ And to-day in most states such damages may be set up by way of defense or counterclaim in an action on a note given for the price.¹¹⁷

¹¹⁶ See *Zabriskie v. Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006; *Kester v. Miller*, 119 N. C. 475, 28 S. E. 115.

Sale of Goods Act, § 53 (4), following *Mondel v. Steel*, *supra*, allows the buyer to recoup his damages in an action for the price and thereafter to bring an action for damages. "This seems erroneous," says Prof. Williston in his note to Sales Act, § 69, "and has been changed in this draft"—citing *Watkins v. Bank*, 134 Fed. 38, 67 C. C. A. 110.

¹¹⁷ *Withers v. Greene*, 9 How. (U. S.) 213, 13 L. Ed. 109; *Ruff v. Jarrett*, 94 Ill. 475; *Wentworth v. Dows*, 117 Mass. 14, per Colt, J.; *Wright v. Davenport*, 44 Tex. 164; *Schurmeler v. English*, 46 Minn. 306, 48 N. W. 1112.

Measure of Damages.

In accordance with the general rule of damages in cases of breach of contract, the measure of damages for breach of warranty is the loss directly and naturally resulting from the breach, in the ordinary course of events.¹¹⁸

In case of a breach of warranty of quality or condition, *prima facie*—that is, in the absence of special circumstances showing proximate loss of a greater amount—this loss is the difference between the value of the goods as they in fact were at the time of delivery¹¹⁹ and the value of the goods as it would have been if they had been as warranted.¹²⁰ Thus the

¹¹⁸ *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88, and cases cited in note 120, *infra*. See Sales Act, § 69 (6); *ante*, p. 357.

¹¹⁹ *Eagle Iron Works v. Railway Co.*, 101 Iowa, 289, 70 N. W. 198. Where goods, such as fruit trees, are sold by description or their kind or quality is otherwise warranted, and it cannot be ascertained until they come into bearing whether they conform to the warranty, the damages may be calculated as of that time. *Shearer v. Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125.

Where plaintiff bought an orchid described as of a certain white variety for 20 guineas, and after cultivation it produced a purple flower and was worth only 7 s. 6 d., but if of the described variety it would have been worth £50, he was entitled to wait till the plant flowered, and to recover the difference between its value as a purple orchid and as that described. *Ashworth v. Wells*, 78 Law T. 136, C. A. 14 Times Law Rep. 227.

¹²⁰ *Jones v. Just*, L. R. 3 Q. B. 197; *Dingle v. Hare*, 7 Q. B. (N. S.) 145, 29 Law J. Q. P. 144; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Case v. Stevens*, 137 Mass. 551; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Rutan v. Ludlam*, 29 N. J. Law, 396; *Freyman v. Knecht*, 78 Pa. 141; *Porter v. Pool*, 62 Ga. 238; *Herring v. Skaggs*, 62 Ala. 180, 84 Am. Rep. 4; *Ferguson v. Hosler*, 58 Ind. 438; *Case Threshing Mach. Co. v. Haven*, 65 Iowa, 359, 21 N. W. 677; *Aultman & Taylor Co. v. Hetherington*, 42 Wis. 622; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Wheeler & W. Mfg. Co. v. Thompson*, 33 Kan. 491, 6 Pac. 902; *E. A. Moore Furniture Co. v. W. J. Sloane*, 166 Ill. 457, 46 N. E. 1128; *Hooper v. Story*, 155 N. Y. 171, 49 N. E. 773; *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *Park v. Richardson & Boynton Co.*, 91 Wis. 189, 64 N. W. 859; *Malmisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175; *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; *Crane Co. v. Construction Co.*, 73 Fed. 984, 20 C. C. A. 233; *Stillwell, Bierce & Smith-Valle Co. v. Canning Co.*, 78 Miss. 779, 29 South. 513. See Sales Act, § 69 (7).

fact that the value of the goods equaled or exceeded the price does not prevent the buyer from recovering damages, if the value of the goods as warranted would have been greater.¹²¹

The rules in respect to special damages which have been stated are applicable.¹²² The question is what a reasonable man, with the knowledge of the parties, would have contemplated as the probable result of the breach of warranty had he applied his mind to it. Thus, where seed is sold for planting, warranted to be of a particular description, and different seed is delivered and sown, the seller is liable for the loss of the crop,

¹²¹ *Douglas v. Moses* (Iowa) 65 N. W. 1004. Evidence is not admissible in defense to show that a profit was realized by the buyer. *Andrews v. Schrelber* (C. C.) 93 Fed. 367.

¹²² Ante, p. 357. See Sales Act, § 70. See *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Parks v. Tool Co.*, 54 N. Y. 586; *Thorne v. McVeagh*, 75 Ill. 81; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4 (seller not liable for valuables stolen from safe warranted burglar proof); *McCormick v. Vanatta*, 43 Iowa, 389; *Aultman v. Stout*, 15 Neb. 588, 19 N. W. 464; *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389; *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110; *Johnston v. Faxon*, 172 Mass. 466, 52 N. E. 539. Buyer reselling with warranty may recover costs of defense against subpurchaser, where seller declines to defend. *Lewis v. Peake*, 7 Taunt. 153; *Hammond v. Bussey*, 20 Q. B. Div. 79. Where the seller sold a refrigerator to a poultry dealer with knowledge that he intended to use it to preserve chickens for the May market, and warranted that it would keep them in perfect condition, which it failed to do, and many chickens were lost, the buyer was entitled to recover, in addition to the difference between the value of the refrigerator as constructed and as warranted, the market value of the chickens lost, less expenses of sale. *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779. Where a manufacturer of ice cream bought coloring matter, which the seller, knowing its purpose, represented to be pure and harmless, but which in fact was poisonous, and the buyer's customers who ate ice cream containing the matter were made sick, and the buyer destroyed the ice cream, held, that the buyer could recover the value of the goods so destroyed, and the damage caused by the resulting loss of customers. *Swain v. Schleffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385. The buyer, suing for breach of warranty of a tackle block, cannot recover a sum paid by him without suit, and without communication with the defendant, to a servant for personal injuries caused by the breaking of the block, unless the servant might have recovered from the plaintiff. *Roughan v. Block Co.*, 161 Mass. 24, 36 N. E. 461.

or the difference in value between the crop raised and such a crop as would ordinarily have been raised had the seed been as warranted, according to the circumstances of the case.¹²³ So, "where one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such use, a certain loss to the buyer will probably result if the warranty is untrue, * * * the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in contemplation of the parties when making the contract."¹²⁴

¹²³ *Wolcott v. Mount*, 38 N. J. Law, 496, 20 Am. Rep. 425, affirming *Id.*, 36 N. J. Law, 262, 13 Am. Rep. 438; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Id.*, 78 N. Y. 393, 34 Am. Rep. 544. See, also, *Passenger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Edgar v. Breck & Sons Corp.*, 172 Mass. 581, 52 N. E. 1083. Cf. *Randall v. Raper*, El., Bl. & El. 84, 27 Law J. Q. B. 266. Contra, *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. Where a druggist sold Paris green to a planter for the known purpose of killing cotton worms, but the article was not Paris green, and failed to kill the worms on being applied to the buyer's crop, the measure of damages for the breach of the contract, if it resulted in the loss of the crop, was the value of the crop as it stood, with the cost of the article, the expense of applying it, and interest. *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689; *Id.*, 61 Tex. 345, 48 Am. Rep. 280.

Where fruit trees were bought to be set out on an agreement that they should be of certain varieties, or others equally desirable, and on commencing to bear they were found to be of inferior variety, the measure of damages was the value they would have added to the premises had they been of the varieties agreed. *Hellman v. Pruyor*, 122 Mich. 301, 81 N. W. 97, 80 Am. St. Rep. 570.

¹²⁴ *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88, per *Berry, J.* See, also, *Willson v. Reedy*, 82 Minn. 256, 20 N. W. 153.

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APPENDIX.

THE SALES ACT

Following the example of Great Britain, which in 1893 enacted the Sale of Goods Act,¹ several states of the Union have already enacted the so-called Sales Act.² The English act was drafted by Mr. M. D. Chalmers, who prepared the English Bills of Exchange Act, which is the foundation of the Negotiable Instruments Law, now in force in a large part of the Union. The Sales Act is based on the English Sale of Goods Act. The original draft was prepared in 1902-3 by Prof. Samuel Williston of Harvard University, at the request of the Commissioners on Uniform State Laws, and was presented to the conference of the Commissioners and discussed at its meeting in 1904. The draft was then re-committed to the Committee on Commercial Law, and a revised draft was presented at the meeting of the conference in 1905. This draft included for the first time a number of sections on the transfer of property by means of document of title,³ which are not contained in the English act, and because of these sections it was thought best again to recommit the draft. At the meeting of the conference in 1906 the draft in its present form was adopted and recommended to the Legislatures of the several states for passage.⁴ The act is in the main declaratory in its effect; but it makes some changes, and necessarily changes the law in some jurisdictions on points concerning which a conflict of laws has existed.

¹ St. 55 & 57 Vict. c. 71; post, p. 418.

² Connecticut, Pub. Acts 1907, c. 212; New Jersey, Laws 1907, c. 182; Arizona, Sess. Laws 1907, c. 99.

³ Sections 27-40.

⁴ For the history of the act, see preface in pamphlet containing the draft printed by the Commissioners. This pamphlet contains notes to the several sections, prepared by Prof. Williston. The annotated draft is published in the Report of the American Bar Association, Vol. 80, 1906, part 2, p. 343 et seq.

**DRAFT OF AN ACT TO MAKE UNIFORM THE
LAW RELATING TO THE SALE OF GOODS.**

PART I.

Formation of the Contract.

Section 1.—[Contracts to Sell and Sales.] (1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

Section 2.—[Capacity—Liability for Necessaries.] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Formalities of the Contract.

Section 3.—[Form of Contract or Sale.] Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and

partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4.—[Statute of Frauds.] (1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Subject-Matter of Contract.

Section 5.—[Existing and Future Goods.] (1.) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6.—[Undivided Shares.] (1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7.—[Destruction of Goods Sold.] (1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a.) As avoided, or

(b.) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8.—[Destruction of Goods Contracted to be Sold.]

(1.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any

fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

The Price.

Section 9.—[Definition and Ascertainment of Price.] (1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10.—[Sale at a Valuation.] (1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, can not or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Conditions and Warranties.

Section 11.—[Effect of Conditions.] (1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12.—[Definition of Express Warranty.] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13.—[Implied Warranties of Title.] In a contract to sell or a sale, unless a contrary intention appears, there is—

(1.) An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of sale.

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14.—[Implied Warranty in Sale by Description.] Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15.—[Implied Warranties of Quality.] Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Sale by Sample.

Section 16.—[Implied Warranties in Sale by Sample.]
In the case of a contract to sell or a sale by sample—

(a.) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b.) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c.) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.*Transfer of Property as Between Seller and Buyer.*

Section 17.—[No Property Passes Until Goods are Ascertained.] Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18.—[Property in Specific Goods Passes When Parties so Intend.] (1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

Section 19.—[Rules for Ascertaining Intention.] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.—Where there is an unconditional contract to sell

specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3.—(1.) When goods are delivered to the buyer “on sale or return,” or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may re-vest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b.) If he does not signify this approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. When is a reasonable time is a question of fact.

Rule 4.—(1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except

in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words *Collect on Delivery* or their equivalents.

Rule 5.—If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight of cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20.—[**Reservation of Right of Possession or Property When Goods are Shipped.**] (1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right there-

by. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is endorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21.—[Sale by Auction.] In the case of a sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22.—[Risk of Loss.] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations

under the contract, the goods are at the buyer's risk from the time of such delivery.

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Transfer of Title.

Section 23.—[Sale by a Person Not the Owner.] (1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect—

(a.) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b.) The validity of any contract to sell or sale under any special common-law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24.—[Sale by One Having a Voidable Title.] Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25.—[Sale by Seller in Possession of Goods Already Sold.] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26.—[Creditors' Rights Against Sold Goods in Seller's Possession.] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27.—[Definition of Negotiable Document of Title.] A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

Section 28.—[Negotiation of Negotiable Documents by Delivery.] A negotiable document of title may be negotiated by delivery—

(a.) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29.—[Negotiation of Negotiable Documents by Indorsement.] A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30.—[Negotiable Documents of Title Marked "Not Negotiable."] If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable," or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

Section 31.—[Transfer of Non-Negotiable Documents.] A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt can not be negotiated and the indorsement of such a receipt gives the transferee no additional right.

Section 32.—[Who may Negotiate a Document.] A negotiable document of title may be negotiated—

- (a.) By the owner thereof, or
- (b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document, the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33.—[Rights of Person to Whom Document has been Negotiated.] A person to whom a negotiable document of title has been duly negotiated acquires thereby,

- (a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and
- (b.) The direct obligation of the bailee issuing the document

to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34.—[Rights of Person to Whom Document has been Transferred.] A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35.—[Transfer of Negotiable Document Without Indorsement.] Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36.—[Warranties on Sale of Document.] A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears, warrants:

- (a.) That the document is genuine.
- (b.) That he has a legal right to negotiate or transfer it.
- (c.) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d.) That he has a right to transfer the title to the goods

and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37.—[Indorser not a Guarantor.] The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38.—[When Negotiation Not Impaired by Fraud, Mistake, or Duress.] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

Section 39.—[Attachment or Levy upon Goods for Which a Negotiable Document has been Issued.] If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they can not thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40.—[Creditors' Remedies to Reach Negotiable Documents.] A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means

thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

PART III.

Performance of the Contract.

Section 41.—[Seller must Deliver and Buyer Accept Goods.] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42.—[Delivery and Payment are Concurrent Conditions.] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Section 43.—[Place, Time, and Manner of Delivery.]
(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time

when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44.—[Delivery of Wrong Quantity.] (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45.—[Delivery in Instalments.] (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery

of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46.—[Delivery to a Carrier on Behalf of the Buyer.] (1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47.—[Right to Examine the Goods.] (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the

purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words Collect on Delivery, or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48.—[What Constitutes Acceptance.] The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Section 49.—[Acceptance does Not Bar Action for Damages.] In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50.—[Buyer is Not Bound to Return Goods Wrongly Delivered.] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51.—[Buyer's Liability for Failing to Accept Delivery.] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasion-

ed by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.

Rights of Unpaid Seller Against the Goods.

Section 52.—[Definition of Unpaid Seller.] (1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(a.) When the whole of the price has not been paid or tendered.

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53.—[Remedies of an Unpaid Seller.] (1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them.

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.

(c.) A right of resale as limited by this act.

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right

of withholding delivery similar to and co-extensive with his rights of lien and stoppage "in transitu" where the property has passed to buyer.

Unpaid Seller's Lien.

Section 54.—[When Right of Lien may be Exercised.]

(1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit.

(b.) Where the goods have been sold on credit, but the term of credit has expired.

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55.—[Lien After Part Delivery.] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56.—[When Lien is Lost.] (1.) The unpaid seller of goods loses his lien thereon—

(a.) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

(b.) When the buyer or his agent lawfully obtains possession of the goods.

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

Section 57.—[Seller may Stop Goods on Buyer's Insolvency.] Subject to the provisions of this act, when the buy-

er of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58.—[When Goods are in Transit.] (1.) Goods are in transit within the meaning of section 57:

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57:

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59.—[Ways of Exercising the Right to Stop.] (1.) The unpaid seller may exercise his right of stoppage in

transitu either by obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Resale by the Seller.

Section 60.—[When and How Resale may be Made.]

(1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Rescission by the Seller.

Section 61.—[When and How the Seller may Rescind the Sale.] (1.) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

Section 62.—[Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.] Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the

carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Section 63.—[Action for the Price.] (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64.—Action for Damages for Non-Acceptance of the Goods.] (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65.—[When Seller may Rescind Contract or Sale.] Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Remedies of the Buyer.

Section 66.—[Action for Converting or Detaining Goods.] Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67.—[Action for Failing to Deliver Goods.] (1.) Where the property in the goods has not passed to the

buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68.—[Specific Performance.] Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69.—[Remedies for Breach of Warranty.] (1.) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a.) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he can not rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70.—[Interest and Special Damages.] Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

Interpretation.

Section 71.—[Variation of Implied Obligations.] Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72.—[Rights may be Enforced by Action.] Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section 73.—[Rule for Cases Not Provided for by This Act.] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74.—[Interpretation shall Give Effect to Purpose of Uniformity.] This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 75.—[Provisions Not Applicable to Mortgages.] The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76.—[Definitions.] (1.) In this act, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Buyer” means a person who buys or agrees to buy goods or any legal successor in interest of such person.

“Defendant” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by endorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" mean goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" include taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" mean goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or can not pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 77.—[Inconsistent Legislation Repealed.] All acts or parts of acts inconsistent with this act are hereby repealed.

Section 78.—[Time When the Act Takes Effect.] This act shall take effect on the —— day of one thousand nine hundred and ——.

Section 79.—[Name of Act.] This act may be cited as the Sales Act.

SALE OF GOODS ACT.

AN ACT FOR CODIFYING THE LAW RELATING TO THE SALE OF GOODS.

(ST. 56 & 57 VICT. C. 71, FEBRUARY 20, 1894.)

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental in-

capacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject-Matter of Contract.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller

after the making of the contract of sale, in this act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

8.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale “month” means *prima facie* calendar month.

11.—(1) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has

examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this act unless inconsistent therewith.

Sale by Sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality.

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as Between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unas-certained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or cus-

todier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

Transfer of Title.

21.—(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who

does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt, or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25.—(1) Where a person, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of

title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

Performance of the Contract.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them,

but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a

delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer, must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned

by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

Rights of Unpaid Seller Against the Goods.

38.—(1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this act—

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1) Subject to the provisions of this act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of re-sale as limited by this act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

41.—(1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to shew an agreement to waive the lien or right of retention.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

(a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully claims possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transit.

44. Subject to the provisions of this act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-Sale by Buyer or Seller.

47. Subject to the provisions of this act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods,

the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In an action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach

of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this act.

54. Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

Supplementary.

55. Where any right, duty, or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

58. In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid.

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer.

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this act are hereby repealed as from the commencement of this act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this act.

(4) The provisions of this act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1) In this act, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim and set-off, and in Scotland condescendence and claim and compensation.

“Bailee” in Scotland includes custodier.

“Buyer” means a person who buys or agrees to buy goods.

“Contract of sale” includes an agreement to sell as well as a sale.

“Defendant” includes in Scotland defender, respondent, and claimant in a multiple-poiding.

“Delivery” means voluntary transfer of possession from one person to another.

“Document of title to goods” has the same meaning as it has in the Factors Acts.

“Factors Acts” mean the Factors Act, 1889; the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

“Fault” means wrongful act or default.

“Future goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in ac-

tion and money, and in Scotland all corporeal movables except money. The term also includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Lien" in Scotland includes right of retention.

"Plaintiff" includes pursuer, complainer, claimant in a multiple-poining, and defendant or defender counterclaiming.

"Property" means the general property in goods, and not merely a special property.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods.

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made.

"Warranty," as regards England and Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This act shall come into operation on the first day of January, one thousand eight hundred and ninety-four.

64. This act may be cited as the Sale of Goods Act, 1893.

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